92-1946

No.

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States
October Term, 1993

WARD PETROLEUM CORPORATION, et al.,

Petitioners,

vs.

THE OKLAHOMA CORPORATION COMMISSION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA, DIVISION III

PETITION FOR WRIT OF CERTIORARI

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June, 1993

QUESTIONS PRESENTED

I. Because of an intervening change in the law, were Petitioners' rights to due process of law violated by the application of the doctrines of res judicata and collateral estoppel?

II. Did the Oklahoma Corporation Commission's misleading and erroneous notice given to Petitioners, who were respondents to a pooling order, result in taking Petitioners' property without due process of law?

LIST OF PARTIES

Petitioners are Ward Petroleum Corporation, Verlan W. Harrell, Whitbar Energy Limited Partnership, T. Michael Cocheres, Gilbert Tompson, Norman R. Gelphman, Larry E. Boyd, James Kuhlman, David M. Pulling, Thomas G. Wygant, and Viersen Oil and Gas Company. Respondents are The Oklahoma Corporation Commission, The Louisiana Land & Exploration Co., MacFarlane Company, and Trimble Properties. All parties before the Oklahoma appellate courts are before this Court, with the exception of Nova Energy Corp., whose rights have been transferred to Petitioner Verlan W. Harrell.

Corporate Petitioner Ward Petroleum Corporation has no parent corporation and has no corporate subsidiaries which are not wholly-owned.

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OPINIONS BELOW

The Opinions and Orders below were not officially published. The Oklahoma Court of Appeals, Division III, issued its Opinion on October 13, 1992. APP. 4.[1] The Oklahoma Supreme Court denied Petitioners a writ of certiorari on March 2, 1993. APP. 1. Mandate was issued in this case by the Oklahoma Supreme Court on March 12, 1993 and was published at 64 Okla.B.J. 842 (1993).

[1] The Appendix to this Petition is cited as "APP. __."

JURISDICTIONAL GROUNDS

The Oklahoma Court of Appeals, Division III, entered its decision on October 13, 1992. The Supreme Court of the State of Oklahoma entered its order denying discretionary review of said decision on March 2, 1993. This Court has jurisdiction to review the decision of the Oklahoma Court of Appeals, Division III, as the highest court of the state in which review could be had, pursuant to 28 U.S.C. § 1257 (Supp. 1993).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional provisions, statutes and regulations, which are fully reprinted in the Appendix: U.S. Const. amend. XIV, § 1; Okla. Stat. tit. 52, § 87.1(e) (West Supp. 1993); Oklahoma Corporation Commission Policy Statement No. 45 (May 3, 1984).

STATEMENT OF THE CASE

The Questions Presented arise out of proceedings brought under Oklahoma's "forced pooling" statute, Okla. Stat. tit. 52, § 87.1(e). APP-81. Oklahoma's forced pooling statute was enacted in order to insure that this State's valuable natural resources could be developed, even if all owners of the right to drill therefor do not consent to such development.

Under the statute, an owner of rights

within a drilling and spacing unit - a common source of supply (geological formation) covering a specified surface area established by order of the Oklahoma Corporation Commission ("Commission") - may apply to the Commission for an order authorizing the applicant or some other party to drill a well on the unit, establishing the estimated costs thereof, and providing a respondent with certain options which he may exercise in order to "recover or receive without unnecessary expense his just and fair share of the oil and gas." Okla. Stat. tit. 52, § 87.1(e). Traditionally, Commission forced pooling orders are "three-way orders", i.e. they provide three alternative options for the respondents to elect. In the instant case, any respondent to Pooling Order No. 260474 had the option, within a certain

time, to elect whether he would participate in the costs of development, or whether he would accept a bonus payment plus a small overriding royalty interest as compensation in lieu of participation, or whether he would accept a larger overriding royalty interest as compensation in lieu of participation. APP. 71-75.

Beginning at least in September of 1983 and continuing until early May of 1984, there was controversy at the Commission and among oil and gas industry members regarding the scope of forced pooling orders: Would any election in lieu of participation cause the respondent to relinquish the right to participate only in the first well drilled in the drilling and spacing unit, or would such an election cause the respondent to

relinquish the right to participate in any well drilled in the drilling and spacing unit? In other words, did the forced pooling order pool the initial wellbore or the entire drilling and spacing unit? R. at 337.[2]

Prior to May 3, 1984, the Commission had entered some orders which it intended to have unitwide scope and some orders which it intended to have wellbore scope. Some of those orders had been appealed to the Oklahoma Supreme Court, who had not previously ruled on the scope of forced pooling orders, and the Commission legal staff was having great difficulty in reconciling the Commission's position in those appeals. R. at 340. In addition, the Commission felt that the industry as

[2] References to the record before the Oklahoma appellate courts are cited here at "R. at ___".

a whole was entitled to expect uniformity in the Commission's forced pooling orders and was entitled to a statement by the Commission of its interpretation of law on this issue. R. at 345.

In order to meet these problems, the Commission issued, on May 3, 1984, its Statement of Policy No. 45 wherein the Commission stated unequivocally that "The policy of this Commission is to pool, without exception, by the wellbore . . .". APP. 55.

On September 20, 1983, Inexco Oil Company ("Inexco") filed an application in Cause CD No. 108567 to force pool Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma ("Section 23"). APP. 20. The amended notice regarding hearing of that application stated:

> STATE OF OKLAHOMA TO: A l l Persons, Owners, Producers,

Operators, Purchasers and Takers of oil and gas, and all other interested persons particularly in Custer County, Oklahoma; and more particularly to Glen P. Albright and Alma H. Albright; James E. Kuhlman c/o Thomas G. Wygant; and, if any of the above named are deceased, the unknown heirs, executors, administrators, devisees and assigns, immediate and remote, of the above named persons; and, if any of the above named companies are no longer in existence, the unknown successors or trustees of the above named companies.

NOTICE IS HEREBY GIVEN that Applicant in this Cause is requesting that the Commission pool and adjudicate the rights and equities of oil and gas owners pursuant to Title 52, Section 87.1 O.S., in the Des Moines, Tonkawa, Cottage Grove, Atoka, Morrow, Springer, Cleveland and Marchand common sources of supply underlying all of Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

IT IS ORDERED that this Cause be referred to a Trial Examiner for hearing, taking of evidence and reporting his findings and recommendations to the Commission.

> IT IS ORDERED AND NOTICE IS HEREBY GIVEN that this Cause will be heard before a Trial Examiner at the Corporation Commission, 3rd Floor, Jim Thorpe Building, Oklahoma City, Oklahoma, at 9:00 a.m. on the 17th day of October, 1983, and that this Notice and Order be published as required by law and the rules of the Commission.
>
> NOTICE IS FURTHER GIVEN that all interested persons may appear and be heard. For information concerning this action, contact Alice S. Mitchell, Attorney for Applicant, The Energy Plaza, 3030 N.W. Expressway, Suite 1000, Oklahoma City, Oklahoma 73112, 405-943-0132.

R. at 831; Exhibit 45.

The application was heard on April 20, 1984, at which time Inexco, Ward Petroleum Corporation ("WPC") and Viersen Oil and Gas Company ("Viersen")[3] appeared. At the time of the hearing,

[3] Incorrectly identified as Viersen & Cochran in the transcript of proceedings.

Viersen owned an unleased mineral interest and WPC owned a leasehold interest in Section 23. APP. 21-22.

On May 3, 1984, the Commission issued its Statement of Policy No. 45, which was its third notice in Cause CD No. 108567.[4] Such notice was published by mailing to members of the bar and oil and gas industry, as well as by placing copies of same on a public notice table in the hall on the third floor of the Jim Thorpe Building. R. at 342. Inexco actually received a copy of that policy statement, (r. at 598), as did Inexco's counsel. R. at 499-502. Further, Petitioners each actually received and read a copy of that policy statement. R. at 121; 267; 277;

[4] Prior to the issuance of the Amended Notice and Order Referring and Setting Cause for Hearing quoted above, the Commission issued a Notice and Order Referring and Setting Cause for Hearing. See R. at 831; Exhibit 45.

295; 313-314; 432; and 522.

Thereafter, the Commission issued its Order No. 260474 in Cause CD No. 10867 on June 6, 1984. APP. 62. Petitioners, or their predecessors in interest, elected not to participate with their full interests in the initial well covered by Order No. 260474, opting instead for alternatives provided in the Order. APP. 23. Such elections were the result of: (1) Petitioners' opinion that the location chosen by Inexco for the initial well would be marginal, at best; (2) the Commission's notice of the effect of pooling, as set forth in the policy statement, stated that parties were only relinquishing wellbore rights if they elected not to participate; (3) the terms of Order No. 260474 did not expressly state that an election other than to

participate would result in a relinquishment of unitwide rights; and (4) Inexco did not advise any of the respondents to Order No. 260474, prior to the time that elections were due, that an election not to participate would, in Inexco's opinion, result in a transfer to Inexco of unitwide rights. R. at 85; 113; 114; 125; 126; 198; 208; 280; 282; 284; 286; 291; 295; 296; 298; 302; 311; 313-314; 428-429; 430-431; 432; and 434.

Inexco thereafter drilled a well in Section 23 and completed same in the Des Moines common source of supply (the "Wolfe well"). APP. 23.

In December of 1984, WPC proposed the drilling of an additional well in Section 23 because the Wolfe well was only a marginal producer and could not recover all hydrocarbons from under the 640-acre

drilling and spacing unit. R. at 844; Exhibit 58. WPC obtained orders from the Commission allowing the drilling of an increased density well at an off-pattern location. R. at 844 and 845; Exhibits 59 and 60. In addition, WPC sought another pooling order of the Commission, allowing it and other respondents to Order No. 260474 an election to participate in the increased density well. Order No. 277146 was entered by the Commission pursuant to that application, and WPC thereafter drilled the Albright Farms well in Section 23, which well is a prolific producer of oil and gas.

Order No. 277146 was reversed on appeal in *Inexco Oil Co. v. Corporation Commission*, 767 P.2d 404 (Okla. 1988), *cert. denied* 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed.2d 414 (1989). In *Inexco*,

the Oklahoma Supreme Court determined that the Commission had exceeded its jurisdiction when it entered a second order purporting to pool interests in Section 23, and thus, that none of the Petitioners had the right to participate in production from the Albright Farms well to the extent that they had elected not to participate under the original Pooling Order No. 260474.[5]

After this Court denied certiorari in *Inexco*, Petitioners filed their application in Cause CD No. 149617,

[5] The Supreme Court's decision in *Inexco* was based upon the previous decision in *Amoco Production Co. v. Corporation Commission*, 751 P.2d 203 (Okla. 1988) which was the first opinion to reach the precise question of the scope of Commission forced pooling orders. In its modification of the Court of Appeals' opinion in *Amoco*, the Supreme Court stated that the unitwide effect of elections not to participate under pooling orders had not "been clearly foreshadowed" by previous opinions of the Court. 751 P.2d at 208.

seeking an order of the Commission vacating Order No. 260474 or, in the alternative, modifying Order No. 260474 to allow new, properly informed elections to be made thereunder. R. at 786; Exhibit 1. The primary grounds for vacation of Order No. 260474 was the misleading notice given by the Commission regarding the effect of elections not to participate under that Order: Petitioners' rights to due process of law were violated by the erroneous and misleading notice given by the Commission. *Id.*

By Order No. 358995 issued on July 31, 1991, the Commission denied the requested relief. APP. 11. In adopting the decision of the Administrative Law Judge who originally heard Petitioners' application, the Commission found Petitioners' due process argument

unavailing. APP. 51-52. In so ruling, the Commission determined that Petitioners' application here was barred by the doctrines of res judicata and collateral estoppel arising from the litigation leading to the opinion in *Inexco*. APP. 49-50. The Commission also found that Petitioners had no right to rely on Statement of Policy No. 45, nor upon the language of Order No. 260474 which referred only to the "well". APP. 50-51. The Commission found that Petitioners were not denied due process because "Order No. 260474 was entered based upon proper application and notice. No party was denied an opportunity to appeal and voice their view as to the scope of pooling orders. The Applicants (Petitioners), or their predecessors, chose not to raise such issue prior to

issuance of the Order." APP. 52.

Petitioners timely appealed Order No. 358995 to the Oklahoma Supreme Court, who assigned the case to the Court of Appeals, Division III, for decision.

The Court of Appeals, Division III, issued its decision on October 13, 1992, summarily affirming Order No. 358995 of the Commission. APP. 4.

The Oklahoma Supreme Court denied Petitioners' request for discretionary review of the Court of Appeals' decision on March 2, 1993. APP. 1.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case because the highest court of the State of Oklahoma in which review could be had has decided two federal questions in a way in conflict with applicable decisions of this Court. In so deciding

this case, the state court has allowed the Petitioners to be deprived of property interests worth millions of dollars on the basis of another case in which Petitioners were not provided a full and fair opportunity to present their constitutional arguments. The state court has also allowed Petitioners to be deprived of property based upon notice which is indisputably incorrect and misleading. This Court should grant certiorari to safeguard the basic constitutional principle of "fundamental fairness" and to announce clearly for all courts below that "fundamental fairness" is not served by blind application of the doctrines of res judicata and collateral estoppel, nor by notice which is incorrect and misleading.

In *Hansberry v. Lee*, 311 U.S. 32

(1950), this Court stated:

> State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. Western Life Indemnity Co. v. Rupp, 235 U.S. 261, 273, 35 S.Ct. 37, 40, 59 L.Ed. 220.

311 U.S. at 40.

In the instant case, Petitioners rights were adjudicated in Order No. 358995 on the basis of res judicata and collateral estoppel, allegedly arising out

of the decision in *Inexco*. However, the doctrines of res judicata and collateral estoppel should not have been applied, and their application resulted in a denial of due process to Petitioners.

The Commission found in Order No. 358995 that the doctrines of res judicata and collateral estoppel apply to bar the relief requested by Petitioners. The only support for this finding is Exhibit 85, which contains the **appellate** filings in *Inexco*. However, these filings are completely inconclusive on the issue of whether Petitioners were afforded a proper opportunity to be heard on their due process claim, which is the basis for Petitioners' application seeking to vacate Order No. 260474 on the basis of misleading and erroneous notice.

Even assuming that such doctrines can

be applied in this case, there is a long-standing exception to their application in cases involving constitutional issues where new legal conditions intervene between the first proceeding and the second. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 599-602 (1948). In such cases, the operation of preclusion doctrines results in unequal treatment of similarly situated individuals, some of whom have had the misfortune to have sought legal redress at an earlier phase of legal development. *Id.*

In the instant case, Petitioner's constitutional rights to due process are involved. There can be no dispute that, between the time that the Commission tried the application leading to the decision in *Inexco* and the application filed below, the Oklahoma Supreme Court finally spoke

regarding its interpretation of the scope of pooling orders. *Amoco Production Co. v. Corporation Commission*, 751 P.2d 203 (Okla. 1988). The Oklahoma Supreme Court recognized that the result of *Amoco* had not been clearly foreshadowed by prior decisions. 752 P.2d at 208. There can be no question that the legal climate regarding the issue of what rights are transferred by an election not to participate under a pooling order changed dramatically after *Amoco* was issued.

Under these circumstances, the rule of *Sunnen* has validity. It was a denial of due process of law for Commission and for the Court of Appeals to deny Petitioners' request on the basis of the preclusion doctrines.

When acting in its adjudicative capacity, the Commission is subject to due

process requirements similar to those imposed upon judicial bodies. *Mullins v. Ward*, 712 P.2d 55, 60 (Okla. 1985). Minimum standards of federal and state due process thus govern pooling proceedings. *Id.* When the Commission enters an order which materially affects the rights of a party without notice, such order is facially void. *Id.*

Almost without exception, for cases involving the sufficiency of notice under due process standards, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) provides the cornerstone:

> This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> * * *
>
> An elementary and fundamental requirement of due process in any proceeding which is to be

> accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such a nature as reasonably to convey the required information.
>
> * * *
>
> The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Id. at 314-315 (citations omitted).

The federal courts have universally held that notice issued by an administrative agency satisfies due process, unless the recipient can demonstrate that he or she was misled. *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1546 (7th Cir. 1989), *cert. denied* 493 U.S. 1044 (1990); *Cosby v. Ward*, 843 F.2d 967, 983 (7th Cir. 1988); *Savina Home Industries*,

Inc. v. Secretary of Labor, 594 F.2d 1358, 1365 (10th Cir. 1979); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied* 409 U.S. 842 (1972); *L.G. Balfour Co. v. Federal Trade Commission*, 442 F.2d 1, 19 (7th Cir. 1971); *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied* 347 U.S. 1016 (1954); *Mayhew v. Cohen*, 604 F.Supp. 850, 857 (E.D.Pa. 1984).

"The due process clause prohibits unintelligible, confusing, or misleading notices, or any notices which do not meaningfully inform . . . ." *Doston v. Duffy*, 732 F.Supp. 857, 872-73 (N.D.Ill. 1988).

Under the undisputed facts of this case, Petitioners were misled, both by the Commission's Policy Statement and by the

language contained in Order No. 260474 itself. Petitioners wanted to participate in the development of Section 23. Petitioners were willing to take the risk of developing Section 23. Petitioners would not have elected out of such development had it not been for the Commission's Policy Statement and the language of Order No. 260474. Petitioners presented evidence that they would not have made the election that they did had the Commission not entered its Policy Statement or had the Commission not used the language it did in Order No. 260474.

In *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), this Court reversed a decision of the Texas appellate courts denying Peralta's request to set aside a judgment for lack of notice:

> As we observed in *Armstrong v. Manzo*, 380 U.S., at 552, 85

> S.Ct. at 1191, only "wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded him in the first place." The Due Process Clause demands no less in this case.

485 U.S. at 87.

Worse than the failure to give any notice, as occurred in *Peralta*, is the Commission's express and unequivocal, **but erroneous,** conclusion in its Policy Statement that an election not to participate would **not** result in a relinquishment of unitwide rights. While Petitioners, and everyone else in the State of Oklahoma, were ignorant of the true legal effect of elections not to participate under forced pooling orders, such ignorance was not only **not corrected** by the Commission, but was **in fact fostered** by the Commission's own statement of policy and interpretation of the law.

It must be remembered that the state Supreme Court has expressly found that the unitwide effect of elections not to participate under pooling orders, as first set forth in *Amoco*, had not "been clearly foreshadowed". 751 P.2d at 208. Thus, as of the time that elections were required under Order No. 260474, **everyone** was laboring under the same ignorance of the law.

In *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978), this Court held that termination notices sent by the public utility did not comport with Due Process because the notices did not inform customers of the availability of an procedure to present objections to the bills. 436 U.S. at 14-15. If a failure to tell customers of the availability of a procedure to present objections is a

violation of due process, it should be axiomatic that an affirmative misstatement of the effect of an election under a forced pooling order constitutes a violation of due process.

Petitioners were forced to enter into a contract with another private party -- Inexco -- by their elections under Order No. 260474. They could not postpone such action awaiting adjudication of the matter by the state Supreme Court. In order to provide uniformity to persons making such contracts, the Commission gratuitously gave notice to the entire industry, including Petitioners, that any election under Order No. 260474 would affect only rights in the wellbore of the initial well. While the Commission was absolutely incorrect in its conclusion in its policy statement, the fact remains that it issued

such policy statement because it "believes that it is important to the continuing vitality of the industry, especially with regard to increased drilling investment, to rely on this Commission's expertise and oversight capacity in adopting and stating categorically a uniform policy on which all elements of the industry can rely." APP. 57. The fact that the Commission was dead wrong in issuing its policy statement only enhances Petitioner's due process argument, because the very issuance of such policy statement resulted in lulling Petitioners into not protecting their legal rights by appeal of Order No. 260474 or otherwise.

Although both Inexco and its counsel had received a copy of the Commission's policy statement before Order No. 260474 was entered and Petitioner's elections

were made thereunder, Inexco took no steps to ensure that Petitioners knew that Inexco was taking a position contrary to the Commission's stated policy of wellbore poolings. Inexco simply remained mute: it did not inform Petitioners either before the election period ran or before Petitioner's time to appeal Order No. 260474 expired, that Inexco considered a non-participation election to transfer unitwide rights. Inexco did not appeal Order No. 260474 itself, although it knew that the Commission had given notice that elections under Order No. 260474 would have only wellbore effect; it did not contest the issuance of the Commission's Policy Statement in any manner. Instead, Inexco waited until WPC proposed to drill a well at the very location preferred by Petitioners all along. When that well was

proposed, six months had elapsed since Petitioners had made their elections. In other words, Inexco lay behind the log until it was too late for Petitioners to protect their rights by direct appeal. The state courts, by affirming the Order of the Commission, have allowed such parties to benefit from their own failure to correctly and promptly notify Petitioners of their position, and in so doing have acquiesced in a deprivation of Petitioners' rights without due process of law.

CONCLUSION

Petitioners' rights to fundamental fairness and due process were violated when the Commission entered Order No. 260474 containing the words "the well", "a well", and "said well" after it had issued its unequivocal statement that "[t]he

policy of this Commission is to pool, without exception, by the wellbore ...".

The ultimate question involved in here is one of procedural due process and fundamental fairness: Does inadequate notice of the effect of an election under a pooling order result in denial of due process of law which will allow the Commission to vacate or modify a prior pooling order? Petitioners ask this Court to answer such question in the affirmative, and reverse and remand this proceeding with instructions to afford Petitioners new, properly informed elections under Order No. 260474. Fundamental fairness requires no less.

Respectfully submitted,

Gregory L. Mahaffey*
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of
MAHAFFEY & GORE, P.C.
*Counsel of Record
Attorneys for Petitioners

AFFIDAVIT OF SERVICE AND MAILING

STATE OF OKLAHOMA)
) SS
COUNTY OF OKLAHOMA)

Jayne Jarnigan Robertson, being first duly sworn deposes and says:

1. That the Petition for Writ of Certiorari to the Oklahoma Court of Appeals, Division III to which this Affidavit is attached has been served upon all counsel of record for the parties in this cause in accordance with the provisions of Rule 29.3 of the Rules of the Supreme Court of the United States by placing three copies of the same in the United States Mail, first class postage prepaid, properly addressed to:

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2. That the foregoing represents service on parties required to be served under the provisions of Rule 29 of this Court.

4. That to my own personal knowledge and pursuant to Rule 29.2 of the Rules of this Court, 40 copies of the Petition for Writ of Certiorari and Appendix were mailed, first class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States on the 1st day of June, 1993, which is within the time allowed for filing under the Rules of this Court.

Jayne Jarnigan Robertson

Subscribed and sworn to before me this 1st day of June, 1993.

Notary Public

My Commission Expires:
July 1, 1995

92-1946

No.

Supreme Court, U.S.
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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June, 1993

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OPINIONS AND ORDER RELIED UPON

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Tuesday, March 2, 1993

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

76,720 Federal Deposit Insurance Corporation, as Manager of Federal Savings & Loan Insurance Corporation Resolution Fund in its capacity as receiver for Homestead Savings & Loan Association, Woodward, Oklahoma v. Anita M. Brady, an individual.
Certiorari denied.
CONCUR: Lavender, V.C.J., Simms, Hargrave, Opala, Wilson, Summers, Watt, JJ.
DISSENT: Hodges, C.J.

Kauger, J. dissenting.

I would grant certiorari to address the question of first impression.

77,130 (consolidated with 76,567) Jacqueline Gordon v. Tony Jack Lyons.
Certiorari denied.
CONCUR: Hodges, C.J., Lavender, V.C.J., Simms, Wilson, Summers, JJ.
DISSENT: Hargrave, Opala, Kauger, Watt, JJ.

77,479 Precision Rubber & Plastic, Inc., a corporation v. Continental Insurance Company et al.
Certiorari denied.
All Justices concur.

77,842 Karen Craven v. Susie Justice.
Certiorari denied.
CONCUR: Hodges, C.J., Lavender, V.C.J., Simms, Wilson, Kauger, Summers, Watt, JJ.
DISSENT: Hargrave, Opala, JJ.

78,064 Franks & Son, Inc. v. Town of Big Cabin.
Certiorari denied; appellee's motion for an attorney's fee denied.
All Justices concur.

78,186 Jim H. Waggoner and Wanda Waggoner d/b/a J&W Construction v. State of Oklahoma ex rel. Oklahoma Employment Security Commission.
Certiorari denied.

CONCUR: Hodges, C.J., Lavender, V.C.J., Simms, Hargrave, Opala, Kauger, Summers, Watt, JJ.
DISSENT: Wilson, J.

78,201 Ward Petroleum Corporation, Verlan W. Harrell et al. v. The Oklahoma Corporation Commission, The Louisiana Land & Exploration Company et al.
Certiorari denied.
All Justices concur.

78,204 Jeriann Schucker v. David R. Schucker.
Certiorari denied.
All Justices concur.

78,646 Monumental General Life Insurance Company v. Jamie J. Coppin, Administrator for the Estate of James Eudy.
Certiorari denied.
CONCUR: Hodges, C.J., Lavender, V.C.J., Hargrave, Wilson, Kauger, Summers, Watt, JJ.
DISSENT: Opala, J.
NOT PARTICIPATING: Simms, J.

/s/ Ralph B. Hodges
CHIEF JUSTICE

NOT FOR PUBLICATION

IN THE COURT OF APPEALS
OF THE STATE OF OKLAHOMA
DIVISION NO. III

WARD PETROLEUM CORPORATION, VERLAN W. HARRELL, NOVA ENERGY CORP., WHITBAR ENERGY LIMITED PARTNERSHIP, T. MICHAEL COCHERES, GILBERT TOMPSON, NORMAN R. GELPHMAN, LARRY E. BOYD, JAMES KUHLMAN, DAVID M. PULLING, THOMAS G. WYGANT, and VIERSEN OIL AND GAS COMPANY,	)	
Appellants,	)	
vs.	)	Case No. 78,201
THE OKLAHOMA CORPORATION COMMISSION, THE LOUISIANA LAND & EXPLORATION COMPANY, MACFARLANE COMPANY, TRIMBLE PROPERTIES, SANTA FE ENERGY OPERATING PARTNERS, L.P., AMOCO PRODUCTION COMPANY, AND HADSON PRODUCTION COMPANY,	)	
Appellees.	)	

APPEAL FROM AN ORDER
OF THE CORPORATION COMMISSION

AFFIRMED

Gregory L. Mahaffey,
J. Jayne Jarnigan,
MAHAFFEY & GORE,
Oklahoma City, OK, For Appellants

James W. George,
CROWE & DUNLEVY, P.C.
Oklahoma City, OK, For Appellees MacFarlane Company and Trimble Properties,

Richard A. Grimes,
GRIMES, GELDERS, ROWE & ANDERSON,
Oklahoma City, OK, For Appellee Louisiana Land and Exploration Company.

MEMORANDUM OPINION

Opinion by Robert L. Bailey, Presiding Judge:

Appellants, Ward Petroleum Corporation, Verlan W. Harrell, Nova Energy Corporation, Whitbar Energy Limited Partnership, T. Michael Cocheres, Gilbert Tompson, Norman H. Gelphman, Larry E.

Boyd, James Kuhlman, David M. Pulling, Thomas G. Wygant, and Viersen Oil and Gas Company (Appellants), seek review of an order of the Corporation Commission (Commission) denying Appellants' application to vacate, or alternatively reopen, previous Commission orders pooling interests in §23-T12N-R14W, I.M., Custer County, Oklahoma, by the unit. In this appeal, Appellants allege (1) the notices of the prior pooling orders and effect of elections thereunder were misleading, giving the impression of pooling by the well-bore and effectively denying Appellants due process for which relief should be granted, and (2) the doctrines of res judicata and collateral estoppel, arising from application of the Supreme Court's decision in Inexco Oil Company v. Oklahoma Corporation Commission, 767 P.2d

404 (Okl. 1988) (concerning the same interests and arguably addressing the same substantive issues presented in the instant case) do not apply to the facts of the present case. The central issue presented in this case and in Inexco concerned the effect of prior elections by mineral interest owners believing that the prior Commission orders pooled the subject interests by the well-bore, not by the unit, and the jurisdiction of the Commission to modify or alter those previous orders in accord with the parties' beliefs. In Inexco, the Supreme Court held (1) that a "pooling order when free of vitiating infirmity is res judicata," and (2) that "failure to make a showing [of change of conditions or knowledge of conditions necessitating repeal, amendment or modification of the

prior order(s)] renders an attempt to modify a prior order subject to the prohibition on collateral attacks set forth by the Legislature in 52 O.S. 1981 §111." Inexco, 767 P.2d at 405-6. The Supreme Court thus determined the rights and liabilities of the parties to the present action in and to the subject mineral interests, concluding in Inexco that the challenged order(s) pooled the unit as a unit, not by the well-bore, and that Commission exceeded its jurisdiction in so repooling the unit in the absence of evidence showing the requisite change of condition. See also, Amoco Production Company v. The Corporation Commission of the State of Oklahoma, 751 P.2d 203 (Okl.App. 1986) (approved for publication as modified by the Supreme Court, December 16, 1987).

In the present case, the Commission held that (1) the doctrines of res judicata and collateral estoppel prevented relitigation of the same issues presented in Inexco, and (2) that the parties to the present case, given notice and opportunity to be heard in the previous Inexco hearings, had not been denied due process, conclusions with which we agree. In that regard, the Commission entered detailed findings of fact and conclusions of law appended hereto adequately explaining the decision, and on that basis, finding no legal error in the order of the Commission, we hold the order of the Commission should be affirmed. Rule 1.202(d), Rules of Appellate Procedure in Civil Cases, 12 O.S. 1991, Ch. 15, App. 2.

The order of the Corporation Commission is therefore AFFIRMED.

HANSEN, V.C.J. and HUNTER, J. concur.

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICANT: WARD PETROLEUM CORPORATION, VERLAN W. HARRELL, NOVA ENERGY CORP., WHITBAR ENERGY LIMITED PARTNERSHIP, T. MICHAEL COCHERES, GILBERT TOMPSON, NORMAN R. GELPHMAN, LARRY E. BOYD, JAMES H. KUHLMAN, DAVID M. PULLING, THOMAS G. WYGANT and VIERSEN OIL AND GAS COMPANY	CAUSE CD NO. 149617
RELIEF SOUGHT: TO VACATE ORDER NO. 260474, (Cause CD No. 108567), OR, IN THE ALTERNATIVE TO REOPEN CAUSE CD NO. 108567 AND MODIFY ORDER NO. 260474	ORDER NO. 358995
LAND COVERED: SECTION 23, TOWNSHIP 12 NORTH, RANGE 14 WEST, CUSTER COUNTY, OKLAHOMA.	

ORDER

This cause came on for hearing before Jodi Levine, Administrative Law Judge for

the Corporation Commission of the State of Oklahoma, on June 27 and 28, 1990, July 20, 1990, and October 1 and 8, 1990, at 8:30 a.m. in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for the purpose of taking testimony and reporting to the Commission.

At the time of the hearing, Gregory L. Mahaffey and J. Jayne Jarnigan, Attorneys, appeared for the Applicants, Ward Petroleum Corporation, Verlan W. Harrell, Nova Energy Corp., Whitbar Energy Limited Partnership, T. Michael Cocheres, Gilbert Tompson, Norman R. Gelphman, Larry E. Boyd, James E. Kuhlman, David M. Pulling, Thomas G. Wygant and Viersen Oil

and Gas Company; Richard A. Grimes, Attorney, appeared for The Louisiana Land and Exploration Company; John C. Moricoli, Jr., Attorney, appeared for Greenleaf Energy Corp., Richard D. Veal, Raymond Dale Shipley and Smack Dab Limited; James W. George, Attorney, appeared for MacFarlane Company and Trimble Properties; J. Fred Gist, Attorney, appeared for Santa Fe Energy Operating Partners, L.P.; John R. Reeves, Attorney, appeared for Amoco Production Company; and Lance Tolson, Assistant Deputy General Counsel for Conservation, filed notice of appearance for the Commission.

The Initial Report of the Administrative Law Judge was filed on January 22, 1991, recommending denial of

the Application. The Applicants, joined by Greenleaf Energy Corp., Richard D. Veal, Raymond Dale Shipley and Smack Dab, Limited, timely filed an appeal to that Report.

The Appeal to the Initial Report of the Administrative Law Judge came on for hearing on March 1, 1991, before Randolph S. Specht, Appellate Administrative Law Judge.

At the time of the hearing, Gregory L. Mahaffey and J. Jayne Jarnigan, Attorneys, appeared for the Applicants, Ward Petroleum Corporation, Verlan W. Harrell, Nova Energy Corp., Whitbar Energy Limited Partnership, T. Michael Cocheres, Gilbert Tompson, Norman R. Gelphman, Larry E. Boyd, James E. Kuhlman, David M.

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Pulling, Thomas G. Wygant and Viersen Oil and Gas Company; Richard A. Grimes, Attorney, appeared for The Louisiana Land and Exploration Company; John C. Moricoli, Jr., Attorney, appeared for Greenleaf Energy Corp., Richard D. Veal, Raymond Dale Shipley and Smack Dab Limited; James W. George, Attorney, appeared for MacFarlane Company and Trimble Properties; J. Fred Gist, Attorney, appeared for Santa Fe Energy Operating Partners, L.P.; John R. Reeves, Attorney, appeared for Amoco Production Company; Gordon Brown, Attorney, appeared Hadson Petroleum Company; and Lance Tolson, Assistant Deputy General Counsel for Conservation, filed notice of appearance for the Commission.

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The Appellate Report of the Administrative Law Judge was filed on March 25, 1991, recommending that the Initial Report of the Administrative Law Judge be affirmed. The Applicants, joined by Greenleaf Energy Corp., Richard D. Veal, Raymond Dale Shipley and Smack Dab, Limited, timely filed an appeal to that Report.

The Appeal to the Appellate Report of the Administrative Law Judge came on for hearing on April 23, 1991, before the Commission En Banc.

At the time of the hearing, Gregory L. Mahaffey and J. Jayne Jarnigan, Attorneys, appeared for the Applicants, Ward Petroleum Corporation, Verlan W. Harrell, Nova Energy Corp., Whitbar Energy

Limited Partnership, T. Michael Cocheres, Gilbert Tompson, Norman R. Gelphman, Larry E. Boyd, James E. Kuhlman, David M. Pulling, Thomas G. Wygant and Viersen Oil and Gas Company; Richard A. Grimes, Attorney, appeared for The Louisiana Land and Exploration Company; John C. Moricoli, Jr., Attorney, appeared for Greenleaf Energy Corp., Richard D. Veal, Raymond Dale Shipley and Smack Dab Limited; James W. George, Attorney, appeared for MacFarlane Company and Trimble Properties; J. Fred Gist, Attorney, appeared for Santa Fe Energy Operating Partners, L.P.; John R. Reeves, Attorney, appeared for Amoco Production Company; Gordon Brown, Attorney, appeared Hadson Petroleum Company; and Lance Tolson, Assistant

Deputy General Counsel for Conservation, filed notice of appearance for the Commission.

After hearing arguments of counsel, reviewing the Initial Report of the Administrative Law Judge, the Appellate Report of the Administrative Law Judge and the record in this cause, the Commissioners voted 3-0 to affirm the recommendations of the Administrative Law Judge and Appellate Administrative Law Judge and deny the application. In support of such conclusion, the Commission finds as follows:

FINDINGS

(1) This is an application of Ward Petroleum Corporation, et al. seeking to vacate Order No. 260474, a pooling order

covering Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma, or, in the alternative, to reopen Cause CD No. 108567 and modify Order No. 260474 to give new elections to the respondents.

(2) The Administrative Law Judge conducted an adjudicative inquiry into the sufficiency of the Applicant's search for the identity and whereabouts of those respondents whose addresses are unknown for service of process and could not be ascertained with due diligence. Upon an examination of the record and proof of publication, the Administrative Law Judge found the process to be proper. The Commission finds that the Applicant conducted a meaningful search of all reasonably available sources at hand to

ascertain the whereabouts of those entitled to notice but who were served solely by publication. Notice has been given as required and the Commission has jurisdiction of the subject matter and the parties.

(3) The following is a summary of facts presented at the original hearing in this cause:

On September 20, 1983, Inexco Oil Company (hereinafter "Inexco") filed an application in Cause CD No. 108567 to pool oil and gas interests and adjudicate rights and equities of owners in Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma. The Application described certain common sources of supply and cited the existence of 640-acre

drilling and spacing units for those common sources of supply in Section 23.

The Notice of Hearing stated that the Applicant was requesting that the Commission pool and adjudicate the rights and equities of oil and gas owners in the named common sources of supply underlying said Section 23. The Notice specified a hearing date, described the place of hearing and advised all interested parties of their right to appear and take part in the hearing.

The cause was heard on April 20, 1984, at which time Inexco, Ward Petroleum Corporation and Viersen & Cochran appeared. Viersen & Cochran owned an unleased mineral interest in Section 23. Ward owned an oil and gas leasehold

interest in that section. Ward protested the cause on the basis of fair market value. A Report of the Trial Examiner recommended the application on the terms testified to by Inexco. Ward initially filed, but then withdrew, exceptions to that Report. Order No. 260474 was issued on June 6, 1984, providing the standard 15-day election period.

The Commission issued Statement of Policy No. 45 on May 3, 1984. Order No. 260474 has no reference to that policy statement.

Prior to the hearing in Cause CD No. 108567, Inexco filed a separate pooling application in Cause CD No. 114422. That cause also covered Section 23 but named as its sole respondent

Liberty National Bank & Trust Co. of Oklahoma City, Trustee. That respondent was not named in Cause CD No. 108567. Inexco dismissed Cause CD No. 114422 on June 7, 1984, after negotiating a wellbore farmout agreement with the trustee's lessee, Anson Corporation.

The Applicants, or their predecessors in interest, elected not to participate in the initial well covered by Order No. 260474, opting instead for alternatives provided in the Order. Inexco then drilled that well within the 180-day term provided by said Order. The well was completed in the Des Moines common source of supply.

After Viersen & Cochran elected to take cash bonus under the terms of

Order No. 260474, it leased its mineral interest in Section 23 to Nova Energy Corporation. Nova assigned a portion of that interest to Verlan Harrell, Richard D. Veal, James H. Kuhlman, David M. Pulling, Greenleaf Energy Company, Raymond Shipley and Smack Dab, Ltd.

Subsequently, Ward filed a pooling application in Cause CD No. 122874 in connection with a proposed increased density well in Section 23. Inexco protested that application, arguing that Order No. 260474 was a unit pooling. Ward, supported by Greenleaf Energy Company, Nova Energy Corp., David M. Pulling, James E. Kuhlman and Thomas Wygant, argued that such Order was wellbore in scope. The Ward group wanted

new elections for the second well.

The Initial Hearing Officer ruled in Ward's favor citing Policy No. 45 as the primary consideration. The Commission upheld the Hearing Officer and issued Order No. 277146 on April 25, 1985. Order No. 277146 re-pooled Section 23 and gave new elections to all respondents. Ward and Nova were given operational rights to the exclusion of Inexco.

Inexco appealed Order No. 277146 to the Supreme Court of Oklahoma. Ward, Nova, Greenleaf, Wygant, Pulling and Kuhlman opposed Inexco in the appeal.

On July 5, 1988, the Supreme Court of Oklahoma issued an opinion in the appeal by Inexco. That opinion reversed Commission Order No. 277146, holding that

the original pooling Order No. 260474 was a unit pooling. The Court held the election not to participate in the initial well divested the Applicants of their working interest in Section 23. Order No. 277146 was determined to be an impermissible collateral attack on the original order.

A Petition for Writ of Certiorari was filed with the Supreme Court of the United States by Ward, Nova, Verlan W. Harrell, Lou Ward, Richard Veal, Raymond Dale Shipley, Smack Dab, Ltd., Norman R. Gelphman, Thomas G. Wygant, David M. Pulling, James E. Kuhlman, T. Michael Cocheres, Gilbert Tompson, Whitbar Energy Limited Partnership, Larry E. Boyd and James Hasenbeck. The Petition claimed

that insufficient notice had been given of the unit nature of Order No. 260474. In addition, the Petitioners claimed to have been misled by the combination of Policy No. 45 and the express terms of Order No. 260474.

On April 24, 1989, the Supreme Court of the United States denied the Petition for Writ of Certiorari. On May 8, 1989, the Oklahoma Supreme Court ordered that mandate issue in the Inexco appeal. On August 25, 1989, the application in this cause was filed.

(4) At the hearing, the Applicant presented the testimony of Michael Cocheres, a landman with Ward Petroleum Corporation. He testified that Ward was pooled by Inexco in Cause CD No. 108567.

He stated there was no testimony given on behalf of Inexco concerning a "wellbore" farmout. He has seen an agreement between Inexco and Anson Company limited to the initial wellbore only. Order No. 260474 did not contain the same language as did that agreement. He did not know when Anson and Inexco finalized their agreement. Mr. Cocheres was suspicious that the agreement was made in a manner to avoid presenting testimony concerning the wellbore terms. However, he had no actual knowledge to support such suspicion. He did not have any knowledge of false testimony presented on behalf of Inexco.

The testimony of Mr. Cocheres continued that Ward Petroleum Corporation elected cash bonus under Order No. 260474,

as did Ward Exploration Company for 75% of its interest. Mr. Cocheres and Gilbert Tompson acquired their interest in Section 23 from Ward Petroleum Corporation. All such parties had received from Inexco an offer to farmout in Section 23 on a wellbore basis. However, based on their belief that the pooling order was also wellbore only, the offer was rejected. The cash bonus was elected because Ward did not place any value on a well to be drilled at Inexco's proposed location. That bonus was not, in his opinion, representative of fair market value for unit rights. However, fair market value was the primary issue contested by Ward at the hearing preceding issuance of the order.

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Mr. Cocheres stated that prior to the issuance of Statement of Policy No. 45 ("Policy 45") Ward believed pooling orders were wellbore in scope. Policy 45 confirmed this belief. If Ward had known pooling orders would be construed as unit orders, it would not have elected out of the initial well. Inexco did not inform him that their opinion was different until after the election was made by Ward, this being conveyed by a letter dated December 31, 1984. After the Commission entered Order No. 277146, the second pooling order in Section 23, Ward spent money in reliance on Policy 45 and the language of Order No. 260474.

On cross-examination, Mr. Cocheres stated that Inexco appealed Order

No. 277146 to the Oklahoma Supreme Court. Ward and Nova had been designated as alternative operators thereunder. He was aware at that time that Inexco considered the first order to be a unit order.

In his opinion the notice given in Cause CD No. 108567 was misleading. It did not specifically state the intent to obtain a unit pooling order. He admitted it did provide for adjudication of rights and equities of parties pooled thereby. He was never misinformed of the hearing date, nor did the notice state the pooling order would be wellbore only.

In the opinion of Mr. Cocheres the use of the word "well" in Order No. 260474 made the order misleading. He believed Ward had not erred in its

interpretation of such order. Rather, the error was made by the Commission in issuing Policy 45. He felt that Ward was misled by the form of the order. In his opinion, Inexco should have informed Ward of Inexco's interpretation of the order prior to December of 1984.

Mr. Cocheres was aware that Policy 45 had been withdrawn by the Commission prior to the decision in Amoco Production Co. v. Corporation Com'n of State of Okla., 751 P.2d 203 (1986). Although the facts as presented above were known at that time, Ward chose not to file this application until Inexco's appeal to Order No. 277146 resulted in a decision adverse to Ward.

(5) The Applicant presented

testimony of David Pulling, a petroleum geologist. He claims a working interest in Section 23. He was pooled by Order No. 260474 but chose not to participate. He did not like the location of Inexco's proposed well. He believed his failure to participate would only result in relinquishment of wellbore rights. This belief was based upon Policy 45 and the language of Order No. 260474.

On cross-examination he admitted knowing of the hearing which preceded Order No. 260474. However, he chose not to attend that hearing. He turned down the wellbore farmout offered by Inexco because his reading of the order led him to conclude it was limited to the initial wellbore.

(6) Thomas G. Wygant, a petroleum engineer, testified for the Applicant. He claims a working interest in Section 23. He elected cash bonus under Order No. 260474 as to one-half of his interest, and participated with the rest. He made his election relying upon Policy 45 and the language of the order. He made a business decision to take cash bonus and turn down the wellbore farmout offered by Inexco. Use of the work well in the order led him to the conclusion it was limited to the wellbore.

On cross-examination, Mr. Wygant admitted knowledge of the hearing which led to Order No. 260474. No one prevented his attending, but he chose not to attend. He did not review the pooling statutes

after reading Policy 45, nor did he ask for advice from an attorney concerning the election under Order No. 260474.

(7) Applicants called Robert E. Goldfield, an Administrative Law Judge of the Commission. He was formerly director of the Office of Administrative Proceedings at the Commission. During that period he participated in the preparation of Policy 45. He headed up several meetings with the Commissioners to discuss wellbore versus unit poolings. The policy statement was disseminated to the Mineral Bar and oil and gas industry by mailing to certain parties shown on a Commission mailing list. In addition, copies of the policy were left on a table outside of the Office of Administrative

Proceedings office.

After issuance of Policy 45, he advised the Commission hearing officers to exclude use of the word "unit" or "wells" from pooling orders. Only the word "well" could be used thereafter. Prior to issuance of Policy 45 the Commissioners felt they had authority to pool either by the unit, or by the wellbore.

On cross-examination, Mr. Goldfield stated that the issuance of Policy 45 had been a legislative, rather than an adjudicative, act of the Commission. However, he did believe the policy would impact upon the quantity of rights relinquished under a pooling order, and was a predetermination of owners' rights in a unit. No advance notice of

Policy 45 was given. The first notice was the mailing referred to above. The emphasis of his meetings with the Commissioners was related to the statutory language of 52 O.S. §87.1(e), and the economic impact of the policy.

(8) Jeff Smith, a landman with Anson Company, was called by the Applicant. To his recollection Anson believed Policy 45 was the rule of the Commission, and followed it. He stated that Anson tried to buy a lease from Viersen Oil and Gas after Viersen elected cash bonus under Order No. 260474. It was their belief Viersen had not relinquished all working interest rights by virtue of such election.

On cross-examination, Mr. Smith

admitted to some concern over the interest Viersen had available to lease. Anson had requested a warranty clause in order to protect against the possibility of Order No. 260474 being held to be a unit order concerning the wellbore farmout to Inexco. He did not recall Anson entering into an oral agreement with Inexco prior to May 17, 1984. A letter of that date to Anson's partners indicated no final agreement had been made. He admitted such letter showed the intention of Anson to let Inexco take the risk of drilling the initial unit well yet allow Anson to participate in future wells.

(9) James Kuhlman, a landman, testified for the Applicant. He claims a working interest in Section 23. He

elected not to participate in Inexco's well under Order No. 260474 based upon the language of that order and upon Policy 45.

He was aware of the notice which led to the order, but felt it was not detailed enough to forewarn of a unit pooling. He felt that pooling orders were wellbore in scope prior to Policy 45, but issuance of the policy confirmed such fact. He had participated in the Albright Farms well and spent money thereon.

On cross-examination, Mr. Kuhlman stated he was notified of the hearing which led to Order No. 260474. He did not attend because of several reasons. Ward agreed to appear on his behalf. Additionally, he had felt since 1977 that pooling orders were wellbore only.

Finally, he was not going to participate in the Inexco well. He elected not to push for the location he felt was proper.

(10) Verlan Harrell also testified for the Applicants. He claims an interest in Section 23 through a lease from Viersen & Cochran. That lease was acquired after the 15-day election period expired in Order No. 260474. Based upon such fact, Mr. Harrell was excused to allow the Administrative Law Judge to consider an objection to the presentation of his testimony.

(11) The Applicants called John Glasco, a landman employed by Inexco in April of 1984. In that capacity he initiated the pooling which led to Order No. 260474. He did not recall when Inexco

and Anson reached agreement concerning a wellbore farmout in Section 23. He did recall offering a wellbore farmout to Ward. After the issuance of Policy 45 he did not initiate an action to vacate the policy, nor was he aware of Inexco having initiated such action. He did not recall why Viersen & Cochran were not offered a wellbore farmout. He did not participate in drafting Order No. 260474.

On cross-examination, Mr. Glasco could not recall Viersen requesting a wellbore farmout. He did not have any recollection of negotiating with representatives of Anson at the Commission on April 20, 1984.

(12) Applicant had subpoenaed Alice S. Mitchell to testify. She was a

division attorney with Inexco in 1984. She represented Inexco at the hearing on April 20, 1984. She recalled being on the Commission mailing list at that time. She probably saw Policy 45 shortly after it was issued. She recalled at some point in time after Policy 45 was issued that the Commission returned orders to have the word "well" inserted. She had prepared Order No. 260474. She did not recall why the order used the word "well."

(13) Mr. Verlan Harrell was recalled after the Administrative Law Judge ruled he could testify on the issue of what was reasonable reliance in relation to the order and Policy 45. He stated he learned of the policy shortly after its issuance. He had discussions relating to the policy

prior to that time with Hamp Baker, Chairman of the Commission. It was Mr. Harrell's belief that Policy 45 created wellbore pooling. Prior to acquiring a lease on Viersen & Cochran's interest in Section 23 a determination was made as to the election of Viersen under Order No. 260474.

On cross-examination, Mr. Harrell said he thought poolings were by the unit prior to Policy 45. He had been told by his attorney prior to the policy that poolings were wellbore only. He assumed the policy had the effect of an order. He also thought hearings were conducted prior to its issuance. He was aware that there were appeals pending in the Oklahoma Supreme Court relating to the

issue of unit vs. wellbore policy when Policy 45 was issued. He could not wait 2 or 3 years for the ruling to issue by that Court.

Mr. Harrell was not allowed to testify as to his reliance upon Policy 45 in purchasing a lease from Viersen. An offer of proof was made concerning Mr. Harrell's reliance upon the policy in buying that lease, and in initiating a proposal for the Albright Farms well.

(14) As their final witness, the Applicants called Richard D. Veal, a landman. He was not allowed to testify concerning his reliance upon Policy 45 in purchasing a portion of a lease from Viersen. An offer of proof was made alleging that he paid cash bonus for such

lease in reliance upon such policy, and that he participated in the Albright Farms well with such leasehold. Mr. Veal stated he wanted the Commission to address the issue of transactions made after the hearing on a pooling application. He was of the opinion all respondents should have been offered a wellbore farmout.

On cross-examination, Mr. Veal admitted that he had entered into operating agreements with respondents after hearings on pooling applications. In those cases he did not reopen the cause to offer testimony relating to such fact.

(15) The Protestant, The Louisiana Land and Exploration Company, called Von Martin as its only witness. He was land manager for Inexco in 1984, and supervised

John Glasco. He had attended the hearing on April 20, 1984 and did not recall any discussions with Anson representatives on that day. He did not know of any deal not to reveal the wellbore farmout from Anson. Policy 45 did not change his opinion that poolings were unit in scope. He did not believe Policy 45 was an authorized act of the Commission. He did not tell any of the Applicants what his opinion was in regard to poolings. He did nothing to prevent any party from appearing at the hearing on April 20, 1984. He testified that Inexco paid cash bonus under Order No. 260474 to Ward Petroleum Corporation, James Kuhlman, David Pulling, Thomas Wygant and Viersen & Cochran. He identified a series of documents relating

to the appeal by Inexco of Order No. 260474. He outlined the chain of title for each of the Applicants and the parties represented by Mr. Moricoli. All such parties' chain of title commenced either with Viersen & Cochran or Thomas Wygant. Wygant had leases from the Albright family. Inexco offered Ward a wellbore farmout because of Ward's concern over location of the Albright Farms well. Viersen never requested a wellbore farmout.

On cross-examination, Mr. Martin stated he did not know if negotiations took place on April 20, 1984 between Inexco and Anson. He did not communicate to any of the Applicants concerning Inexco's position on unit pooling before

the letter in December of 1984. The wellbore farmout was offered to Anson because of their concern on location of the initial well. He did not recall discussions with Viersen concerning well location. It was not his general practice to give well information to non-participating respondents.

(16) Upon conclusion of testimony, Mr. Mahaffey made an offer to tender back bonus paid to Viersen under Order No. 260474 in the event this Application was recommended.

(17) The Administrative Law Judge took briefs on the issues in the cause. Thereafter, she issued her Report recommending denial of the Application. In support of such recommendation, she

found as follows:

(A) The doctrines of res judicata and collateral estoppel apply and the Applicants are precluded from raising the issues raised in the Application. The documents presented as Exhibit 85 reveal the prior appeal to the Oklahoma Supreme Court raised identical issues. The parties had a full opportunity to present all issues raised herein to the Supreme Court. That Court ruled against the Applicants in Inexco Oil Company v. Oklahoma Corp. Com'n, 767 P.2d 404 (Okla. 1988). These issue preclusion doctrines prohibit retrying issues which were raised,

considered and determined in a prior action; as well as issues not raised, but which properly could have been raised.

(B) Even if the Applicants were not precluded from trying the issues raised, their evidence does not support their claims. The Applicants did not prove a change in knowledge of conditions relative to the issuance of Order No. 260474. They did not establish any act of fraud sufficient to vacate such order. Nor did the Applicants show any facial invalidity relating to the Order.

(C) The parties had no right to rely upon Policy 45. The Supreme

Court of Oklahoma has determined such policy to be an arbitrary and capricious act of the Commission. The Court condemned the policy's attempt to circumvent the clear language in the pooling statute.

(D) The use of the word "well" in Order No. 260474 does not create a situation where detrimental reliance dictates vacation of the Order. The Supreme Court of Oklahoma has ruled that the use of such word does not form a basis for claiming a pooling is limited in scope.

(E) Any reliance placed upon either Policy 45 or the language of Order No. 260474 was at the risk of

the Applicants.

(F) The evidence clearly showed Applicants were not denied rights of due process. Order No. 260474 was entered based upon proper application and notice. No party was denied an opportunity to appeal and voice their view as to the scope of pooling orders. The Applicants, or their predecessors, chose not to raise such issue prior to issuance of the Order.

(18) The Commission adopts by reference herein the Initial Report of the Administrative Law Judge, as well as the recommendation of the Appellate Administrative Law Judge that such Report be affirmed. It is the opinion of the

Commission that the Applicants have failed to establish any basis for vacating or modifying Order No. 260474. To do so would violate the vested rights of the Protestants.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of the State of Oklahoma as follows:

The Application of Ward Petroleum Corporation, Verlan W. Harrell, Nova Energy Corp., Whitbar Energy Limited Partnership, T. Michael Cocheres, Gilbert Tompson, Norman R. Gelphman, Larry E. Boyd, James H. Kuhlman, David M. Pulling, Thomas G. Wygant and Viersen Oil and Gas Company, seeking to vacate Order No. 260474, a pooling order covering Section

23, Township 12 North, Range 14 West, Custer County, Oklahoma; or, in the alternative, to reopen Cause CD No. 108567 and modify Order No. 260474, is hereby denied.

DONE AND PERFORMED this 31 day of July 1991.

CORPORATION COMMISSION OF OKLAHOMA

/s/ Bob Hopkins
Bob Hopkins, Chairman

/s/ Bob Anthony
Bob Anthony, Vice-Chairman

/s/ J.C. Watts, Jr.
J.C. Watts, Jr., Commissioner

BY ORDER OF THE COMMISSION:

/s/ Berdee S. Holt
Berdee S. Holt, Secretary

HAMP BAKER
COMMISSIONER

NORMA EAGLETON
COMMISSIONER

JAMES B. TOWNSEND
COMMISSIONER

OKLAHOMA
CORPORATION COMMISSION

JIM THORPE OFFICE BUILDING

OKLAHOMA CITY, OKLAHOMA 73105

TO: All Commission Staff and the Mineral Bar

FROM: Hamp Baker
Norma Eagleton
James B. Townsend

DATE: May 3, 1984

STATEMENT OF POLICY

The purpose of this Statement of Policy is to set forth, without reservation, this Commission's policy as to the question: Does a pooling order determine the rights and equities only as to the well which is proposed to be drilled under the order (pool per

wellbore) or does a pooling order determine the rights and equities as to the well proposed under the order as well as all possible increased density wells which might be drilled in the unit (pool per unit)?

"Pooling by the unit" is a question of legal interpretation and semantics. Since the statute only permits one well per drilling and spacing unit, the practical effect has been to pool by the wellbore despite the language found in 52 O.S. Supp. 1983, §87.1, which speaks to development of the unit as a unit. Recently, this Commission has broken with that practice. At the time of our decisions in those cases, seemingly compelling factual bases were presented for issuing an order which pooled not only the initial well but also any increased

density wells.

However, reflecting only those few orders which we have issued previously pooling per unit, this Commission has reevaluated that position. The question of whether pooling should be accomplished by the wellbore or by the unit in anticipation of the possibility of increased density wells, is, in the end, a question of interpretation of law; specific factual circumstances are irrelevant. As such, the Commission believes that it is important to the continuing vitality of the industry, especially with regard to increased drilling investment, to rely on this Commission's expertise and oversight capacity in adopting and stating categorically a uniform policy on which all elements of the industry can rely.

The policy of this Commission is to pool, without exception, by the wellbore for the following reasons:

1. Although 52 O.S. Supp. 1983, §87.1, speaks to development of the unit as a unit, it is also equally clear that, by the same statute, only one well is authorized per drilling and spacing unit.

2. In order for this Commission to authorize the drilling of additional wells on a unit - increased density wells - the spacing order authorizing only one well per unit must be amended.

3. By pooling per unit, development and the flow of participation dollars is being inhibited. Parties who would otherwise invest and participate in the drilling of developmental wells are precluded from such participation based on their, or their predecessors in interest,

decision regarding the initial well in the unit.

4. Due to the prospect of inhibited development and concomitant inhibited flow of participation dollars, the only alternative available is that of despacing. Such alternative is not desirable since such a scheme will only serve to leave spacing "windows" and therefore not serve to protect correlative rights.

5. The industry, mineral bar and mineral interest owners have a right to expect consistency in the decisions of this Commission. Following the Oklahoma Supreme Court's decision in Monson v. State ex rel. Oklahoma Corporation Commission, No. 57,867 (December 12, 1983), finding this Commission to be a functional analogue of a court of record,

it is of prime importance that this Commission provide some degree of certainty in its decision-making. However, this is not to say that this administrative agency intends to adhere strictly to the doctrine of stare decisis in its decision-making.

The Commission is also cognizant that three of the recent orders pooling as to the unit have been appealed to the Oklahoma Supreme Court. To the ends expressed in this Statement of Policy, it is our intention to move the Court to remand those cases to the Commission for further deliberation.

We would also specifically state that this Statement of Policy in no way relates to the drilling of substitute or twin wells. The issue which has been presented to us in such cases is whether there has

been a continuous operation in the drilling of a well; Amarex Inc. v. Baker, 655 P.2d 1040 (Okl. 1983); or whether some geologic or engineering reason exists which would necessitate the drilling of a substitute or twin well. As a separate issue, the possibility of the need for such well has been addressed on a case by case determination, based on the geologic and/or engineering evidence submitted. Such issue is not addressed nor is it concerned with the question presented herein.

/s/ Hamp Baker
HAMP BAKER, Chairman

/s/ Norma Eagleton
NORMA EAGLETON, Vice-Chairman

/s/ James B. Townsend
JAMES B. TOWNSEND, Commissioner

HB:NE:JBT/GH:alj/bl

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICANT: INEXCO OIL COMPANY	CAUSE CD NO. 108567
IN THE MATTER OF POOLING OIL AND GAS INTERESTS, DESIGNATING APPLICANT OR SOME OTHER PARTY OPERATOR AND ADJUDICATING THE RIGHTS AND EQUITIES OF OIL AND GAS OWNERS IN THE DES MOINES, TONKAWA, COTTAGE GROVE, ATOKA, MORROW, SPRINGER, CLEVELAND AND MARCHAND COMMON SOURCES OF SUPPLY UNDERLYING ALL OF SECTION 23, TOWNSHIP 12 NORTH, RANGE 14 WEST, CUSTER COUNTY, OKLAHOMA.	ORDER NO. 260474

REPORT OF THE COMMISSION

This Cause came on for hearing before Jodi B. Levine, Trial Examiner for the Corporation Commission of the State of Oklahoma, on the 20th day of April, 1984, at 9:00 a.m. in the Commission's

Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for the purpose of taking testimony and reporting to the Commission.

At the time of the hearing, Alice S. Mitchell, Attorney, appeared for Inexco Oil Company; Michael Stack, Attorney, appeared for Ward Petroleum; Gordan D. Ryan, Attorney, appeared for Vierson & Cochran; and M. Keywood Deese, Deputy General Counsel for Conservation, filed notice of appearance.

The Trial Examiner heard this Cause and filed her report with the Commission. Ward Petroleum, filed Exceptions to the Report which were withdrawn prior to hearing on appeal. The Report has Been considered and the Commission therefore finds as follows:

FINDINGS

1. That this is the Application of Inexco Oil Company to pool and adjudicate the rights and equities of oil and gas owners in the Des Moines, Tonkawa, Cottage Grove, Atoka, Morrow, Springer, Cleveland and Marchand common sources of supply underlying all of Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma as previously spaced by Order No. 197226. At the time of the hearing, the Morrow and Springer common courses of supply were dismissed, and Steve Knox and Samson Resources were dismissed as parties to the Cause.

2. That the Commission has jurisdiction over the subject matter herein; that notice has been given in all respects as required by law and by the rules of the Commission. That the

Applicant is the owner of an interest in the area covered by the Application. That the Applicant has furnished the Oklahoma Corporation Commission with a plugging agreement and surety or a financial statement as required by the law and by the rules of the Commission.

3. That the land described in paragraph 1 above is a drilling and spacing unit for the common courses of supply also named in paragraph 1, all heretofore Ordered by the Commission by Order No. 197226.

4. That Inexco Oil Company, an owner of the right to drill a well on said drilling and spacing unit and to develop and produce said common sources of supply, has not agreed with all of the other such owners in such drilling and spacing unit to pool their interests and to develop the

drilling and spacing unit and common sources of supply, and the Commission should issue an Order requiring such owners to pool and develop the drilling and spacing nit and common sources of supply covered hereby.

5. That Inexco Oil Company proposes to develop said unit and the common sources of supply therefor by the drilling of a well thereon and, to avoid the drilling of unnecessary wells and to protect correlative rights, all owners should be required to pool and develop the common sources of supply covered hereby, upon the terms and conditions set out in "Order" below, all of which are found hereby, after a consideration of the substantial evidence in this Cause, to be just and reasonable and will afford each owner the opportunity to recover or

receive without unnecessary expense his just and fair share of the production.

6. That in the interest of the prevention of waste and the protection of correlative rights, this Application should be granted, and the rights of all owners pooled and adjudicated.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of Oklahoma as follows:

1. That Inexco Oil Company proposes to drill a well in Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma, a drilling and spacing unit for the Des Moines, Tonkawa, Cottage Grove, Atoka, Cleveland and Marchand separate common sources of supply, and to develop said unit and the common courses of supply therefor as a unit, and the rights and

equities of all oil and gas owners covered hereby are pooled, adjudicated, and determined.

2. a. That estimated well costs are:

Completed for production - $1,598,250

Completed as a dry hole - $1,194,250

b. That $1250.00 per acre cash, plus an overriding or excess royalty of 1/16 of 8/8 is a fair, reasonable and equitable bonus to be paid unto each owner who elects not to participate in said well by paying such owner's proportionate part of the costs thereof; such cash bonus plus overriding or excess royalty, when paid as set out in this Order, is satisfaction in full

for all rights and interests of such owners in the well covered hereby, except for any normal 1/8 royalty interest, as defined in 52 O.S., Section 87.1(e) (1971).

c. That an overriding or excess royalty of 1/8 of 8/8 is also a fair, reasonable, and equitable bonus to be tendered unto each owner who elects not to participate in said well by paying such owner's proportionate part of the cost thereof; such overriding or excess royalty is satisfaction in full for all rights and interests of such owner in the well covered hereby, except for any normal 1/8 royalty

interest, as defined in 52 O.S., Section 87.1(e) (1971).

PROVIDED, however, that any excess royalty, overriding royalty, or other payments out of production shall be charged against the overriding or excess royalty, or overriding royalty, as hereinabove set forth, and same shall be reduced by the amount of any such excess.

PROVIDED, further, in the event the oil and gas interest of any owner is subject to any royalty, overriding royalty or other payments out of production which create a burden on such interest in excess of the burdens set out

in paragraph 2b above, the owner of any such interest shall not be entitled to the option provided in paragraph 2b above, but shall be required to either participate or to accept the additional royalty provided in paragraph 2c above.

3. That any owner of the right to drill on said drilling and spacing unit who has not agreed with Inexco Oil Company to develop said unit and common sources of supply is accorded the following elections:

a. To participate in the development of the unit and common sources of supply by agreeing to pay such owner's proportionate part of the actual costs of the well

covered hereby and by paying, as set out herein, to Applicant such owner's proportionate part of the estimated completed for production costs thereof, as set out in paragraph 2a above, or by securing or furnishing security for such payment satisfactory to the Applicant; in all events, such owner's costs in said well shall not exceed its proportionate part of the actual or the reasonable costs thereof which shall be determined by the Commission in the event there is a dispute as to such costs; the payment of such owner's proportionate part of the estimated completed for production costs of said well,

or the securing therefor, as aforesaid, shall be accomplished within 20 days from the date of this Order, such owner's proportionate part of the costs of, and of the production from, such well to be in proportion to the number of acres such owner has in the unit; or,

b. To receive the cash bonus plus overriding or excess royalty, as set out in paragraph 2b above, which cash bonus shall be paid or tendered, if same can be paid or tendered, within 30 days from the date of this Order, or, if same cannot be paid or tendered, a fund therefore created for the use

and benefit of any owner accepting or deemed to have accepted such cash bonus plus overriding or excess royalty. Such funds deposited in said escrow or trust account shall be held for the exclusive use and sole benefit of the party or parties entitled thereto. If any payment of bonuses due and owing under the order cannot be made to any party entitled to such payment, then said bonuses, and any royalty payments received by the Operator due such party, shall be paid into an escrow or trust account and shall not be commingled with any funds of the Applicant or Operator.

c. To receive in lieu of the cash bonus plus overriding or excess royalty, as set out in paragraph 2b above, the overriding or excess royalty only as set out in paragraph 2c above.

4. That each owner of the right to drill in said drilling and spacing unit to said common sources of supply covered hereby, who has not agreed to develop said unit other than the Applicant, shall elect which of the alternatives set out in paragraph 3 above such owner accepts, said election to be made to Inexco Oil Company, in writing, within 15 days from the date of this Order; in the event any owner fails to elect within the time and in the manner as set out above which of the alternatives set forth in paragraph 3

above, any such owner accepts, then such owner is deemed to have elected to receive the cash bonus plus excess royalty, as set out in paragraph 2b above; however, if the interest is burdened in excess of a 1/16 x 8/8 over and above and normal 1/8 royalty then such owner is deemed to have accepted the alternative set out in paragraph 2c above. In the event any owner elects to do other than participate in said well by paying his pro rata share of the costs thereof, or fails to make any election provided above, such owner shall be deemed to have relinquished unto Inexco Oil Company all of such owner's right, title, interest or claim in and to the well, except for any normal 1/8 royalty interest, defined above, or other share in production to which such owner may be

entitled by reason or an election hereunder.

5. That Inexco Oil Company, in addition to any other rights provided herein, shall have a lien, as set out in 52 O.S., Section 87.1(e) (1971), on the interest of any owner, subject to this Order, who has elected to participate in the well covered hereby by paying such owner's proportionate part of the costs thereof; provided, however, that in the event an owner elects to participate in said well by paying his proportionate part of the costs thereof and fails or refuses to pay or to secure the payment of such owner's proportionate part of the completed for production costs as set out in paragraph 2a above, or fails or refuses to pay or make an arrangement with the Applicant for the payment thereof, all

within the periods of time as prescribed in this Order then such owner is deemed to have elected to receive the cash bonus plus excess royalty, as set out in paragraph 2b above; however, if the interest is burdened in excess of a 1/16 of 8/8 over and above the normal 1/8 royalty then such owner is deemed to have accepted the alternative set out in paragraph 2c above. Thereupon, the payment of such cash bonus shall be made by Applicant within 30 days after the last day on which such defaulting owner, under this Order, should have paid his proportionate part of such costs or should have made satisfactory arrangements for the payment thereof.

6. That: INEXCO OIL COMPANY
The Energy Plaza,
Suite 1000
3030 N.W. Expressway
Oklahoma City, OK 73112

is designated operator of the well and common sources of supply covered hereby and all elections must be communicated to said operator at the address above as required in this Order.

7. That Inexco Oil Company must commence operations for the drilling or other operations with respect to the well covered hereby within 180 days from the date of this Order and diligently prosecute the same to completion in a reasonably prudent manner, or this Order shall be of no force and effect, except as to the payment of cash bonuses.

8. That Inexco Oil Company or its attorney shall file with the Secretary of the Commission, within 10 days from the date of the Order, an Affidavit stating that a copy of said Order was mailed within 3 days from the date of this Order

to all parties pooled by this Order, whose addresses are known.

DONE AND PERFORMED this 6 day of June, 1984.

CORPORATION COMMISSION OF OKLAHOMA

Hamp Baker, Chairman

/s/ Norma Eagleton
Norma Eagleton, Vice-Chairman

/s/ James B. Townsend
James Townsend, Commissioner

ATTEST:
/s/ Berdee S. Holt
Berdee S. Holt, Secretary
(SEAL)

CONSTITUTIONAL PROVISIONS AND STATUTES

1. U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Okla. Stat. Ann. tit. 52, O.S. § 87.1(e) (West 1991):

> The drilling of any well or wells into any common source of

supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited. The drilling of any well or wells into a common source of supply, covered by a pending spacing application, at a location other than that approved by a special order of the Commission authorizing the drilling of such well is hereby prohibited. The operation of any well drilled in violation of any spacing so entered is also hereby prohibited. When two or more separately owned tracts of land are embraced within an established spacing unit, or where

there are undivided interests separately owned, or both such separately owned tracts and undivided interests embraced within such established spacing unit, the owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owners have not agreed to pool their interests and where one such separate owner has drilled or proposes to drill a well on said unit to the common source of supply, the Commission, to avoid the drilling of unnecessary wells, or to protect correlative rights, shall, upon a proper application therefor and a hearing thereon, require such owners to pool and develop their lands in the spacing unit as a unit.

The applicant shall give all owners whose addresses are known or could be known through the exercise of due diligence at least fifteen (15) days' notice by mail, return receipt requested. The applicant shall also give notice by one publication, at least fifteen (15) days prior to the hearing, in some newspaper of general circulation published in Oklahoma County, and by one publication, at least fifteen (15) days prior to the date of the hearing, in some newspaper published in the county, or in each county, if there be more than one, in which the lands embraced within the spacing unit are situated. The applicant shall file proof of publication and an affidavit of mailing with the

Commission prior to the hearing. All orders requiring such pooling shall be made after notice and hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas. The portion of the production allocated to the owners of each tract or interests included in a well spacing unit formed by a pooling order shall, when produced, be considered as if produced by such owner from the separately owned tract or interest by a well drilled thereon. Such pooling order of the Commission shall made definite

provisions for the payment of costs of the development and operation, which shall be limited to the actual expenditures required for such purpose not in excess of what are reasonable, including a reasonable charge for supervision. In the event of any dispute relative to such costs, the Commission shall determine the proper costs after due notice to interested parties and a hearing thereon. The operator of such unit, in addition to any other right provided by the pooling order or orders of the Commission, shall have a lien on the mineral leasehold estate or rights owned by the other owners therein and upon their shares of the production from such unit to the extent that costs incurred in

the development and operation upon said unit are a charge against such interest by order of the Commission or by operation of law. Such liens shall be separable as to each separate owner within such unit, and shall remain liens until the owner or owners drilling or operating the well have been paid the amount due under the terms of the pooling order. The Commission is specifically authorized to provide that the owner or owners drilling, or paying for the drilling, or for the operation of a well for the benefit of all shall be entitled to production from such well which would be received by the owner or owners for whose benefit the well was drilled or operated, after

payment of royalty, until the owner or owners drilling or operating the well have been paid the amount due under the terms of the pooling order or order settling such dispute. No part of the production or proceeds accruing to any owner of a separate interest in such unit shall be applied toward payment of any cost properly chargeable to any other interest in said unit.

Supreme Court, U.S.
FILED
JUL 1 1993
OFFICE OF THE CLERK

(3)

No. 92-1946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WARD PETROLEUM CORPORATION, VERLAN W. HARRELL, NORMAN R. GELPHMAN, THOMAS G. WYGANT, DAVID M. PULLING, JAMES KUHLMAN, T. MICHAEL COCHERES, GILBERT TOMPSON, WHITBAR ENERGY LIMITED PARTNERSHIP, LARRY E. BOYD, AND VIERSEN OIL AND GAS COMPANY,

Petitioners,

v.

THE OKLAHOMA CORPORATION COMMISSION, THE LOUISIANA LAND AND EXPLORATION COMPANY, MCFARLANE COMPANY, AND TRIMBLE PROPERTIES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF OKLAHOMA, DIVISION III

Richard A. Grimes
GRIMES, GELDERS, ANDERSON & DAY
101 Park Avenue, Suite 350
Oklahoma City, OK 73102
(405) 236-1929

Attorney for Respondent, The Louisiana Land and Exploration Company, as successor by merger and acquisition to Inexco Oil Company

July 1, 1993

BEST AVAILABLE COPY

35pp

RULE 29.1 STATEMENT

As required by Rule 29.1 of this Court, the corporate Respondent, The Louisiana Land and Exploration Company, lists the following parent companies, subsidiaries, or affiliates:

A. Respondent, The Louisiana Land and Exploration Company, has no parent corporation.

B. Following are the subsidiaries of such Respondent:

1. Inexco Oil Company
2. Wilson Brothers Drilling Company
3. LL&E Properties, Inc.
4. Westport Utilities Systems Co., Inc.
5. LL&E Algeria, Ltd.
6. LL&E Australia Pty. Limited
7. LL&E Australia (Offshore) Pty. Limited
8. LL&E, Canada Holdings
9. LL&E, Ltd.
10. LL&E Colombia, Inc.
11. LL&E Egypt, Inc.
12. LL&E Erave Pty. Ltd.
13. LL&E Espana, Inc.
14. LL&E (Europe-Africa-Middle East) Inc.
15. LL&E France, S.A.
16. LL&E Gas Marketing, Inc.
17. Gippsland Pty. Ltd.
18. LL&E Holland Ltd.
19. LL&E, Inc.
20. LL&E Indonesia, Ltd.
21. LL&E International, Inc.
22. LL&E Mining, Inc.
23. LL&E (Netherlands) Inc.
24. Maralou Netherlands Partnership[1]
25. CLAM Petroleum Company
26. LL&E Netherlands North Seal Ltd.
27. LL&E Netherlands Petroleum Company
28. LL&E Overseas Petroleum Ltd.
29. LL&E Petroleum Marketing, Inc.

30. LL&E Petroleum Terminals, Inc.
31. LL&E Petroleum Resources International, Inc.
32. LL&E Pipeline Corporation
33. LL&E PNG, Pty. Ltd.
34. LL&E Sepik Pty. Ltd.
35. LL&E Suez, Inc.
36. LL&E Timor Sea Pty. Ltd.
37. LL&E Tunisia, Inc.
38. LL&E (U.K.) Inc.
39. LL&E Yemen, Ltd.
40. LLOXY Holdings, Inc.
41. LLOXY Production Financing Company, Inc.
42. Molokai California Limited
43. Kaluakoi Corporation
44. South Louisiana Land Company, Ltd.[2]
45. Swamplands, Inc.[2]
46. White Pine Leasing, Inc.

[1] Unconsolidated affiliate accounted for under the equity method.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WARD PETROLEUM CORPORATION, VERLAN W. HARRELL, NORMAN R. GELPHMAN, THOMAS G. WYGANT, DAVID M. PULLING, JAMES KUHLMAN, T. MICHAEL COCHERES, GILBERT TOMPSON, WHITBAR ENERGY LIMITED PARTNERSHIP, LARRY E. BOYD, AND VIERSEN OIL AND GAS COMPANY,

Petitioners,

V.

THE OKLAHOMA CORPORATION COMMISSION, THE LOUISIANA LAND AND EXPLORATION COMPANY, MCFARLANE COMPANY, AND TRIMBLE PROPERTIES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF OKLAHOMA, DIVISION III

This matter comes before the Court on Petition of Ward Petroleum Corporation, et al. ("Petitioners") for Writ of Certiorari served upon The Louisiana Land and Exploration Company ("Respondent") on June 3, 1993. In opposition thereto, Respondent sets forth the pertinent facts and controlling authorities, demonstrating that no reasons exist herein to grant the Petition.

RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

I. The Oklahoma Oil And Gas Conservation Laws

The Petitioners have included in their Petition for a Writ of Certiorari a Statement of the Case which

includes an unsupported statement of the rationale behind the Oil and Gas Conservation Laws of the State of Oklahoma. There is nothing in the record of this case to base such a statement upon.

The valid creation of drilling and spacing units by the Oklahoma Corporation Commission depends upon a number of factors, only one of which relates to the ability of a well to drain from the geological reservoir. Drilling and spacing units are established within geological common sources of supply.[1] The initial order establishing a common source of supply creates a certain size of unit, generally varying from 2-1/2 acres to 640 acres, based upon a finding relating to whether oil or gas will be the predominant hydrocarbon produced, and preliminary expert estimate of the amount of acres to be drained by one well within the common source of supply.[2] It is generally recognized that drill-

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[1] Okla. Stat. Ann. tit. 52, Section 86.1(c) (1981) provides as follows:

> The term "common source of supply" shall comprise and include that area which is underlaid or which, from geological or other scientific data, or from drilling operations, or other evidence, appears to be underlaid, by a common accumulation of oil or gas or both; provided, that, if any such area is underlaid, or appears from geological or other scientific data, or from drilling operations, or other evidence, to be underlaid by more than one common accumulation of oil or gas or both, separated from each other by a strata of earth and not connected with each other, then such area, as to each said common accumulation of oil or gas, or both, shall be deemed a separate common source of supply.

[2] title 52, Section 87.1(c) provides that the following facts are material to creation of a drilling and spacing unit:

> (1) The lands embraced in the actual or prospective common source of supply;
>
> (2) The plan of well spacing then being employed or contemplated in said common source of supply;
>
> (3) The depth at which production from said common source of supply has been or is expected to be found;
>
> (4) The nature and character of the producing or prospective producing formation or fomations;
>
> (5) Any other relevant geological or scientific data.

ing and spacing units in Oklahoma are prospectively created.[3] In other words, the drilling and spacing unit is established prior to the drilling, completion and analysis of the initial unit well.[4]

If, after the common source of supply has been defined by the Oklahoma Corporation Commission, the drilling of wells establishes a need to enlarge or extend the common source of supply, the Oil and Gas Conservation Laws authorize an interested party to apply for an expansion of the boundaries thereof to include adjacent lands.[5] These extensions of the common source of supply are no longer subject to a finding as to the ability of a well to drain. The statute dictates that the drilling and spacing units covering the expanded area be of the same size and shape as under the initial spacing order, unless certain facts are proven to justify otherwise.[6]

No matter the size of the drilling and spacing unit established within a common source of supply, the spacing order allows only one well to be drilled and produced thereon. Each spacing order carries with it the implication that the one authorized unit well will adequately develop the unit. Until there has been a change in the conditions assumed by the Oklahoma

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[3] See Id., at Section 87.1(c)(1).

[4] This fact is implicitly recognized by the Oklahoma courts in decisions relating to the pooling authority granted under title 52, Section 87.1(e). In *Amoco Production Company v. Corporation Commission of Oklahoma*, 751 P.2d 203 (Okla.App. 1986) (Adopted by the Supreme Court of Oklahoma February 9, 1988), the Court found that original elections under pooling orders are sometimes based upon lack of information. The Court was unsympathetic to an owner who chose not to risk money in the unit well, but who, after discovering information generated at the expense of others in its drilling, wanted to participate in subsequent wells.

[5] title 52, Section 87.1(a).

[6] Id.

Corporation Commission to exist on the date a drilling and spacing unit is created, or until the knowledge of such conditions changes, the unit is to be developed by the one unit well.[7]

The "pooling" referred to by the Petitioners is authorized by the Oil and Gas Conservation Laws of Oklahoma.[8] Under Oklahoma law, any party owning a right to drill within the drilling and spacing unit, can apply for a pooling order. Neither the Oil and Gas Conservation Law, nor the Rules of the Corporation Commission of Oklahoma, require that a well location be specified within the application.[9] As a practical matter, applications for pooling never mention location. The application in Cause CD No. 108567, the Cause which resulted in the original pooling order in controversy in this case, did not specify any location for the unit well.

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[7] In fact, title 52, Section 87.1(c) specifically limits the density of well spacing by providing as follows:

> Subject to other provisions of this act, the order establishing such drilling and spacing unit shall direct that no more than one (1) well shall thereafter be produced from the common source of supply on any unit so established, and that the well permitted on that unit shall be drilled at the location thereon as prescribed by the Commission . . .

[8] title 52, Section 87.1(e) states that when two or more owners within a drilling unit have not agreed to pool their interests and a unit well has been proposed, or drilled, the Corporation Commission of Oklahoma shall "upon a proper application therefor and a hearing thereon, require such owners to pool and develop their lands in the spacing unit as a unit."

[9] See title 52, 87.1(e). The Rules of Practice of the Oklahoma Corporation Commission require only that the pooling application identify the applicant; provide the legal description of the drilling and spacing unit; list the case number assigned to the application; provide the name and address of each respondent; allege certain jurisdictional facts; cite the legal authority for Commission jurisdiction of the matter; state that the applicant cannot reach agreement with the respondents; and, identify the proposed unit operator. See Oklahoma Corporation Commission Rules of Practice, Rule Nos. 8-1 and 8-3.

The Oklahoma Corporation Commission is authorized to enter pooling orders only upon terms which are just and reasonable.[10] The pooling orders of the Commission have evolved into instruments which offer alternatives to participation in the risk of drilling the unit well. Those alternatives generally include either cash bonus and royalty interest, or no cash but an increased royalty interest. In either event, the party electing from such alternatives will continue to share in revenues. The extent of sharing will depend upon the alternative selected, and will be less than the share realized by participating parties. However, the party's reduced share results from its desire not to assume the financial risks taken by the participating owners.

The Petitioners contend in their Statement of the Case that "beginning in September of 1983 and continuing until early May, there was controversy at the Commission and among oil and gas industry members regarding the scope of forced pooling orders." The foundation for this argument is the issuance by the Oklahoma Corporation Commission of what the Petitioners call "Statement of Policy No. 45." Based upon the alleged reliance of *some* of the Petitioners upon that policy, the Petitioners assert a violation of the right to due process of *all* Petitioners.[11]

II. The Original Pooling Order Covering The Drilling And Spacing Unit

The Petitioners' Statement of the Case notes the entry by the Commission of Order No. 260474 ("the

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[10] title 52, Section 87.1(e)

[11] Although the Petitioners' Statement of the Case would lead this court to believe that *all* of the named Petitioners relied upon Statement of Policy No. 45, there is conspicuously absent from the record below any evidence of such reliance by Viersen Oil and Gas Company, Norman R. Gelphman, Larry E. Boyd and Whitbar Energy Limited Partnership. Moreover, Verlan Harrell did not even own an interest in Section 23 on the date of Order No. 260474.

original pooling order") issued in Cause CD No. 108567, an application by Inexco Oil Company (Respondent's predecessor in title) for an adjudication of rights and equities in Section 23, Township 12-North, Range 14 West, Custer County, Oklahoma. That tract was a 640 acre drilling and spacing unit for a number of common sources of supply. There were no wells in Section 23 on the date of the original pooling order, and only by taking the financial risks associated with drilling could parties generate geological information.[12]

Order No. 260474, the only valid and final pooling order covering Section 23, designated Inexco Oil Company as unit operator. A party who chose to participate in the risk of the initial unit well was required to pay to Inexco that party's share of the cost of such operation. The order's reference to the unit well was appropriate given the fact that only one unit well was authorized. The Oklahoma Corporation Commission could hardly require that participating owners pay to Inexco monies associated with wells which might be necessary in the future.

The Petitioners correctly quote the Notice of Hearing which preceded the entry of the original pooling order. That Notice of Hearing was issued by the Commission pursuant to its procedural rules. However, the Petitioners erroneously contend that Statement of Policy No. 45 was a "third notice in Cause CD No. 108567." There is absolutely no justification for that claim, and Petitioners' contention is a misrepresentation of facts. Policy No. 45 was simply a three-page document signed by the Commissioners and laid

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[12] See *Amoco Production Company v. Corporation Commission of Oklahoma*, 751 P.2d at 207.

on a table in a hall. (R. at 342.)[13] It was not preceded by any notice of rulemaking. (R. at 364-365; 374.) In fact, there was no notice of any kind given prior to its mysterious appearance on the table. (R. at 363; 374.) That document does not have any reference to what was its intended effect upon proceedings heard prior to May 3, 1984, the date it was signed by the Commissioners. (R. at 376.)

Cause CD No. 108567 was heard on April 20, 1984, at which time representatives of Inexco Oil Company ("Inexco"), Ward Petroleum Corporation ("Ward") and Viersen Oil and Gas Company ("Viersen") appeared. Viersen owned an unleased mineral interest in Section 23. Ward owned an oil and gas leasehold interest in that section. Ward protested the Cause, citing fair market value as its only objection. (R. at 830 — Report of the Trial Examiner.) A Report of the Trial Examiner recommended the application on the terms testified to by Inexco. Ward initially filed, but then withdrew, exceptions to that Report. (R. at 830.)

Order No. 260474 was issued by the Commission on June 6, 1984, providing a fifteen (15) day election period. It had no reference to Policy No. 45. (R. at 830 — Order No. 260474.) No appeal was taken from the Order and it became final thirty (30) days after June 6, 1984.

The appellants, or their predecessors in interest, elected not to take the risk of drilling the initial well under Order No. 260474, choosing alternatives of cash bonus and/or excess royalty. (R. at 580-582; 868 — Exhibit No. 83; 869 — Exhibit No. 84.) Inexco commenced the initial unit well within the 180-day term provided in the Order, and completed it in the Des Moines common source of supply. (R. at 842 — Completion Report.)

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[13] References to the record before the Appellate Courts of Oklahoma are cited as "R. at —."

After Viersen elected to take a cash bonus of $199,375.00, it purported to lease its interest in Section 23 to Nova Energy Corporation ("Nova"). Nova assigned a portion of that interest to Verlan Harrell, Richard D. Veal, James H. Kuhlman, David M. Pulling, Greenleaf Energy Company, Raymond Shipley and Smack Dab, Ltd. (R. at 530-532; 552-554; 556-557 and 588-590.)

Subsequently, Ward filed a pooling application in Cause CD No. 122874 in connection with a proposed increased density well in Section 23. Inexco protested that application, arguing that the original pooling order was a unit pooling. Ward, supported by Greenleaf Energy Company, Nova Energy Corp., David M. Pulling, James E. Kuhlman and Thomas Wygant, argued that such Order was wellbore in scope. The Ward group wanted new elections for the second well.

The Initial Hearing Officer ruled in Ward's favor citing Policy No. 45 as the primary consideration. The Commission upheld the Hearing Officer and issued Order No. 277146 on April 25, 1985. Order No. 277146 re-pooled Section 23 and gave new elections to all respondents.

Inexco appealed Order No. 277146 to the Supreme Court of Oklahoma. Ward, Nova, Greenleaf, Wygant, Pulling and Kuhlman opposed Inexco in the appeal.

On July 6, 1988, the Supreme Court of Oklahoma issued an opinion in the appeal by Inexco. In *Inexco Oil Company v. Oklahoma Corp. Com'n,* 767 P.2d 404 (Okl. 1988), cert denied 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed. 2d 414 (1989), the Court reversed Commission Order No. 277146, holding that the original pooling order was a unit pooling. The Court held the election not to participate in the initial well divested the

Appellants of their working interest[14] in Section 23. Order No. 277146 was determined to be an impermissible collateral attack on the original order.

A Petition for Writ of Certiorari was filed with this Court by the Petitioners. The Petition claimed that insufficient notice had been given of the unit nature of the original pooling order. In addition, the Petitioners claimed to have been misled by the combination of Policy No. 45 and the express terms of the original pooling order. (R. at 870 — Exhibit No. 85.)

On April 24, 1989, the Court denied the Petition for Writ of Certiorari. On May 8, 1989, the Oklahoma Supreme Court ordered that mandate issue in the Inexco appeal. On August 25, 1989, the Application in Cause CD No. 149617 was filed. After entry of Order No. 358995 an appeal was filed with the Supreme Court of Oklahoma. The appeal was assigned to the Court of Appeals, Division III. That Court upheld the Commission Order. The Supreme Court of Oklahoma thereafter refused to review the decision of the Court of Appeals.

SUMMARY OF ARGUMENT

I. The Issues Presented For Consideration By The Petitioners Do Not Raise Federal Questions

A) The record of this case reveals that the Petitioners were not deprived of due process rights guaranteed by the Fourteenth Amendment.

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[14] The term "working Interest" is defined in H. Williams and C. Meyers, *Oil and Gas Terms* (7th Ed. 1987) as "the operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land." As noted therein:

> In the simple situation of a lessor who executes a lease, reserving 1/8th royalty, to a lessee who creates no burden on his estate, the working interest consists of 7/8th of production subject to all costs of exploration and development.

1) The property rights relinquished by the Petitioners by virtue of their election not to participate in the initial unit well were transferred to the Respondent under the original pooling order.

2) Neither Petitioners, nor their predecessors, appealed the original pooling order despite having been given notice of the hearing which preceded its entry.

3) The failure of the Petitioners to appeal the original pooling order permanently foreclosed their ability to attack the effect of such order upon their oil and gas property interest.

4) This appeal is a continued attempt to collaterally attack the original pooling order.

B) The notice which preceded the entry of the original pooling order was proper in all respects.

1) All parties to be subjected to the original pooling order were given ample opportunity to appear at an evidentiary hearing and present evidence in opposition to the relief requested.

2) The Petitioners, or their predecessors in title, actually appeared at the hearing and offered evidence in opposition to the requested relief.

3) A party electing in response to the original pooling order was on notice of the potential construction of state law so as to yield unit pooling.

C) The Petitioners are precluded by the doctrines of "Res Judicata" and "Estoppel by Judgment" from arguing the issues of insufficient notice, or reliance.

D) The claims raised by the Petitioners have previously been argued to this Court and denied.

E) The issues of reliance raised in the Petition for a Writ of Certiorari form no basis for granting such Petition.

ARGUMENT

This Court should deny the Petition for A Writ of Certiorari filed herein. The ruling of the Oklahoma Supreme Court does not decide a federal question. Obviously, such ruling does not conflict with decisions of another state court of last resort, or of a federal court of appeals. Finally, the ruling does not decide a federal question in a way in conflict with applicable decisions of this Court.

The Court of Appeals, Division III, of the State of Oklahoma, affirmed the order of the Commission denying an application to vacate a final order of that administrative body. That court correctly decided that the Petitioners were barred by issue preclusion doctrines from obtaining such relief. The Court of Appeals also affirmed the Commission finding that the evidence presented by Petitioners failed to prove either the existence of misleading notice relative to entry of the original pooling order, or that the Petitioners were misled by that notice.

PROPOSITION I

THE WRIT SHOULD BE DENIED BECAUSE THE PETITIONERS WERE NOT DEPRIVED OF THEIR RIGHT TO PROCEDURAL DUE PROCESS.

As decided by the Oklahoma Supreme Court in *Inexco*, supra, a relinquishment of Petitioners' property rights took place upon expiration of the election period provided in the original pooling order. That order was issued after notice and a hearing upon the application of Inexco Oil Company. The Petitioners, or their predecessors in title, were given notice of that hearing and were represented by counsel at the hearing.[15] The Petitioners did not appeal the original

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[15] See Ex. 32; R. 142, 117.

pooling order, and it became final. Inexco Oil Company was designated as operator of the drilling and spacing unit and the common sources of supply described in said order.

The record establishes that the Petitioners have never requested an amendment of the original order to remove Inexco as operator, or to limit the scope of rights covered thereby. No party ever presented, or attempted to present, testimony which would support the requisite change in knowledge of condition upon which such amendment could be based. Without that evidence, the Oklahoma Corporation Commission was powerless to amend the order. *Marlin Oil Corporation v. Corporation Commission,* 569 P.2d 961 (Okl. 1977). If the Petitioners felt there was effected a deprivation of rights by the original pooling order, it was incumbent upon the Petitioners to appeal that order and prevent it from becoming final. *Nilsen v. Ports of Call Oil Co.,* 711 P.2d 98, 102 (Okl. 1985).

The Petitioners do not argue that the original pooling order was ambiguous. Rather, they purportedly relied upon their personal construction of the language of the order as "notice" of the order's intent in making their decision not to participate. Thereafter, when the Oklahoma Supreme Court ruled the order to be unit in scope the Petitioners argue they were unconstitutionally misled.

PROPOSITION II

THIS WRIT SHOULD BE DENIED BECAUSE THE NOTICE WHICH PRECEDED THE ENTRY OF THE ORIGINAL POOLING ORDER WAS PROPER IN ALL RESPECTS.

The Petitioners allege that their rights of procedural due process were violated by the entry of the original pooling order. This contention is based upon a claim that the "notice" given in Cause CD No. 108567

was misleading. Using that conclusion as foundation, the Petitioners construct an argument that the Commission lacked "jurisdiction" to enter a pooling order affecting unit rights in Section 23.[16] However, the facts stated to support the claim of misleading notice do not relate to the concept of notice. More importantly, the actual notice given in Cause CD No. 108567 was proper in all respects.

SUBPROPOSITION A:

NEITHER THE LANGUAGE OF ORDER NO. 260474, NOR POLICY NO. 45, ARE TO BE CONSIDERED "NOTICE" FOR PURPOSES OF CAUSE CD NO. 108567.

An often quoted definition of procedural due process of law is that stated by Daniel Webster in the argument he made to the Court in the Dartmouth College Case[17] wherein he asserted that by such term is meant "a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." Succinctly stated, this concept of procedural due process relates to the required proceedings which lead to a deprivation of life, liberty, or property.

The Oklahoma Supreme Court has recognized that before a person may be deprived of a property right by Commission order that person must be given notice of the proceedings against him and must be given an opportunity to defend himself in a hearing. See *Union*

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[16] This is a curious argument in light of Petitioners' apparent admission that Order No. 260474 was held to be a "unit" order by the Oklahoma Supreme Court in *Inexco Oil Company v. Oklahoma Corp. Com'n*, 767 P.2d 404 (Okl. 1988), cert denied 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed.2d 414 (1989), a position contrary to that argued to the Commission in the proceedings below. In the introduction of their Brief in Chief to the Oklahoma Supreme Court the Petitioners state "this appeal is not an attempt to revisit the unit vs. wellbore pooling dispute . . ."

[17] *Dartmouth College v. Woodward*, 4 Wheat (US) 518, 4 L.Ed. 629.

Texas Petroleum, a Division of Allied Chemical Corporation vs. Corporation Com'n, 651 P.2d 652 (Okl. 1982).

The Petitioners' attack upon the Court of Appeals decision upholding the original pooling order hides behind the guise of a contention that they were unfairly deprived of property rights in Section 23 by virtue of a lack of knowledge of the unit nature of that pooling order. This approach was required because the order is final and unappealed. In Oklahoma, delayed attacks upon final Commission orders, whether collateral or direct, are limited to proceedings which allege either jurisdictional deficiency or the existence of extrinsic fraud in the procurement of the order.[18] See 52 Okla. Stat. Ann. 1981, §112; *Crest Resources v. Corporation Commission,* 617 P.2d 215, 218 (Okl. 1980); and, *State v. Corporation Com'n,* 590 P.2d 674, 677 (Okl. 1979). See also Morgan, *Delayed Attacks on Final Judgments,* 72 Okl.L.Rev. 45 (1980).

The Petitioners do not cite any defect in the actual Notice of Hearing filed and published in Cause CD No. 108567. Rather, the Petitioners manufacture a new definition of "notice" and assert that Policy No. 45 and the original pooling order itself fall within that term. There is no merit in that contention.

All of the cases cited by the Petitioners as precedent for their proposition discuss the requirement of notice in advance of a hearing. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950), a cornerstone case for Petitioners, dealt with consideration of the sufficiency of notice given to parties potentially affected by a hearing to be conducted after the date of notification. *Mullane* con-

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[18] The Appellants are not pursuing in this Petition the issue of fraud in the procurement of Order No. 260474. The sole issue offered in support of the effort to overturn the decision below is deficiency of notice.

forms to the well settled rule that notice serves the purpose of providing advance warning of scheduled court proceedings so that a reasonable opportunity to prepare will be afforded. See *Re: Application of Gault*, 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct 1428 (1967).

The remaining cases cited by Petitioners as supportive of their claim of a due process violation are not persuasive. In *Doston v. Duffy*, 732 F.Supp. 857 (N.D. ILL. 1988) the notice was ruled deficient because it failed to incorporate specific provisions required by Federal Regulations. In *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978) the parties affected by an agency's order terminating services were not informed of their opportunity to protest the proposed termination.

As set forth above, the notice preceding the original pooling order clearly complied with oil and gas conservation laws of Oklahoma. That notice unambiguously informs the affected parties of their right to appear and object to the requested relief.

Policy No. 45 was signed by the Commission on May 3, 1984, without any advance public knowledge. (R. at 362-363.) The hearing which led to the original pooling order had already taken place on April 20, 1984. The Application and original Notice in Cause CD No. 108567 had been filed September 20, 1983. The Amended Notice was filed on September 26, 1983. It was the original and amended notice which advised interested parties of the pending pooling and adjudication of rights by the Commission. On the date of the issuance of Policy No. 45 the Petitioners, or their predecessors, had already been subjected to the jurisdiction of the Commission and brought before that body for the hearing.

A review of the face of the proceedings in Cause CD No. 108567 reveals the original and amended Notices of Hearing. Such a review does not yield evi-

dence of Policy No. 45. Nothing in the application, notice, service of process, or order filed in the Cause refers to that Policy. The Petitioners interjected Policy No. 45 in this Petition by reference to testimony given to the Commission. That policy is not to be considered notice given in anticipation of the hearing provided to Petitioners.

The Petitioners also claim that the original pooling order itself acts as "notice" of the proceeding in Cause CD No. 108567. However, as with Policy No. 45, the entry of the order on June 6, 1984 followed both the date actual notice was given in the Cause, and the date of the hearing to which the notice applied. Clearly, the order does not impact upon the Commission's acquisition of jurisdiction over either the parties notified of the hearing, or over the subject mater of the Cause.

In addition, the original pooling order never refers to Policy No. 45, either expressly or implicitly. The relationship between the Order and Policy No. 45 suggested by Petitioners was again supplied by extrinsic evidence in the form of testimony by individuals whose own "interpretation" of the Order incorporated the policy.

The Petitioners are wrong in their assertion that Policy No. 45 and the original pooling order can form a basis for misleading notice. Neither the Policy, nor the Order, relate to the issues properly considered in this appellate review.

SUBPROPOSITION B:

THE NOTICE WHICH PRECEDED THE HEARING IN CAUSE CD NO. 108567 WAS PROPER IN ALL RESPECTS.

The Petitioners argue that the notice preceding the hearing in Cause CD No. 108567 was not specific enough to forewarn them of the entry of a unit pooling order. This argument misconceives the purpose of notice.

In a Commission proceeding procedural due process creates the obligation of proper service of process and requires notice of the nature of the hearing and an opportunity to be heard. See *Union Texas Petroleum, a Division of Allied Chemical Corporation v. Corporation Com'n,* 651 P.2d 652 (Okl. 1982).

It is undisputed in this Cause that the Petitioners, or their predecessors, were properly served with notice of the hearing to be conducted in Cause CD No. 108567. That notice clearly set forth the hearing date; notified the respondents of their opportunity to be heard; and, most importantly, told them that there was being sought an order adjudicating their rights and equities, and pooling their oil and gas interests in Section 23. (R. at 831 — Exhibit 45 — Amended Notice and Order Referring and Setting Cause for Hearing.) It cannot be contended such notice was misleading.

In *Morgan v. United States,* 304 U.S. 1 (1934), this Court held that the notice of hearing before an administrative body must not be too broad and general, and must apprise the parties of what will occur at the hearing. Further, in *Butland v. Bowen,* 673 F. Supp. 638 (D. Mass. 1987), the District Court ruled that a notice which falsely notified claimants of the ramifications of a statute was misleading and insufficient to vest an adminstrative agency with personal jurisdiction. The notice given in Cause CD No. 108567 when viewed in light of such rulings is not misleading.

52 O.S. 1981 §87.1(e) authorizes the Commission to conduct hearings for the purpose of pooling severally owned tracts within a drilling and spacing unit. The Commission is directed by that statute to issue orders which adjudicate the rights and equities of such owners on terms found by the Commission to be just and reasonable.

The notice of hearing in Cause CD No. 108567 spoke directly to what the statute authorized. Any

party reading its contents would be apprised of a hearing intended to result in a pooling order which would adjudicate rights and equities of owners on the exact terms allowed by the statute. Nothing within the notice could be categorized as false, or misleading.

PROPOSITION III

THE PETITIONERS ARE PRECLUDED BY THE DOCTRINES OF "RES JUDICATA" AND "ESTOPPEL BY JUDGMENT" FROM AGAIN ARGUING THE ISSUES OF INSUFFICIENT NOTICE, OR RELIANCE.

The Application in Cause CD No. 149617 sought to vacate or modify the original pooling order based upon a claim that Policy No. 45 gave "notice" that elections under the order would only affect rights within the initial wellbore covered thereby. In that same application Petitioners sought identical relief by claiming that the notice given prior to the hearing in Cause CD No. 108567 was constitutionally deficient. To the extent that the Petitioners rely upon such issues, they are precluded from presenting those claims by recognized principles of "res judicata" and "estoppel by judgment."

In *Brown v. Briggs*, 292 P.2d 385 (Okl. 1956), the Court stated the elements of those doctrines as follows:

> "[Res Judicata] bars a second suit between the same parties on the same subject matter resolving the same issues between the parties in the same capacity. Estoppel by judgment is limited to issues common to difference actions which were expressly, or by necessary implication, adjudicated in the first action or judgment." *Brown*, 292 P.2d at *387*.

All of the Petitioners, or their predecessors in title, were parties to a previous action covering Section 23 which began at the Commission and was ap-

pealed to the Oklahoma Supreme Court. In Cause CD No. 122874, Ward Petroleum Corporation filed a pooling application covering the same common sources of supply named in Order No. 260474. Inexco Oil Company, the predecessor of Respondent, opposed that application before the Commission. One of the primary issues in that Cause was the effect of Policy No. 45 on Order No. 260474. Another of the contentions was that the notice in Cause CD No. 108567 was too narrow to allow unit pooling. Order No. 277146, as issued in Cause CD No. 122874, was predicated upon a Hearing Officer's Report which specifically cited the Policy Statement as the basis of recommendation of Ward's application. The commission adopted that report and refused Inexco's argument that the policy statement was an unauthorized action. (R. at 847 — Order No. 277146.)

Inexco appealed Order No. 277146 to the Oklahoma Supreme Court in Case No. 64,455. As is evidenced by the briefs from that appeal submitted as exhibits of Respondent in the hearing for the Cause leading to this Writ, the Petitioners considered the effect of the policy statement one of the essential issues on appeal. (R. at 870 — Exhibit No. 85.) Typical of the parties' position is the statement of Nova Energy Corporation in its Brief in Opposition to Consolidation filed in the appeal on January 21, 1986:

> "In Appeal Nos. 61,029, 61,179 and 61,820, the Appellants in each case are attempting to overturn a finding by the Corporation Commission that an initial forced pooling for the first well on a unit, effectively forced (sic) pooled all subsequently drilled wells in the same unit. Each of the Corporation Commission orders in question in those appeals were issued prior to the Statement of Policy No. 45 issued by the Corporation Commission. Therefore, in those appeals Statement of Policy No. 45 is not

an issue. *In appeal No. 64,455 the Statement of Policy No. 45 is a major issue."* (Emphasis added.)

In its response to a Motion for Summary Disposition, filed in the Supreme Court of Oklahoma, Ward was attempting to distinguish the issues on appeal from existing precedent. In Paragraph 13(b) of that Response Ward stated:

"In the instant case, the non-operators had every right to and did make elections relying upon the belief that the initial order covered a single well. *This reliance was supported by the language of the order and the OCC statement of policy."* (Emphasis added.)

The Petitioners continued to argue throughout the appeal that the notice provided in Cause CD No. 108567 did not meet minimum standards of due process. They asserted that the notice was not specific enough concerning rights to be relinquished by a respondent who elects not to participate in the unit well.

After the Supreme Court of Oklahoma issued the decision in Case No. 64,455 Petitions for Rehearing were filed. In the Petition of Greenleaf Energy Corporation, Thomas G. Wygant, David M. Pulling and James E. Kuhlman and Petitioners stated in support thereof as follows:

"Due process requires that owners of property be given notice reasonably calculated to apprise them of an adjudicative proceedings which substantially affects their constitutionally protected property interests. In the instant case, Appellees were notified by Policy Statement No. 45 and the express terms of Order No. 260474 that respondents electing not to participate in the drilling of the Wolfe No. 1-23 well would relinquish to Inexco only their

> rights in and to the proposed well. Appellees were never notified that their failure to participate in the drilling of the Wolfe No. 1-23 well would result in the relinquishment of all rights in the entirety of the unit." (R. at 980 — Exhibit No. 85.)

Following an adverse decision by the Oklahoma Supreme Court, the Petitioners, with other parties, jointly filed a Petition for Writ of Certiorari to the Oklahoma Supreme Court with this Court. In that Petition the main arguments of the Petitioners were those alleged in this Cause. The Petition states in Proposition II thereof as follows:

> "The First Order — together with Policy Statement No. 45 — gave clear notice to Petitioners that the First Order had only a well-bore scope, so that an election not to participate would *not* prejudice Petitioners' ability to exploit their leaseholds through participation in later wells to be drilled in the unit. Acting on this notice, Petitioners made an opt-out election under the first order." (R. at 870 — Exhibit No. 85.)

The foregoing clearly illustrates that both this Court and the Supreme Court of Oklahoma were squarely presented with the very issues concerning the policy statement and notice raised in the application filed in Cause CD No. 149617, and asserted as a basis for granting the Writ of Certiorari filed in this case. Those issues were presented in a prior action, the subject matter of which included the original pooling order. Obviously, the opinion rendered by the Supreme Court of Oklahoma in that appeal, as reported in *Inexco,* supra, rejected the Petitioners' arguments. This court refused to review that decision. The Petitioners cannot now revisit those issues.

Moreover, even if the Petitioners were to contend that the issues in this appeal which relate to the policy

statement and notice are in some manner different from those argued in Case No. 64,455, they are still prevented from now asserting such issues. The doctrine of res judicata as defined by the Oklahoma Supreme Court forms a barrier to an offer of evidence intended to address an issue which *could* have been presented in the prior action. As noted in *Morrison v. Board of Ed. of Independent School District No. 6 of Craig County,* 424 P.2d 963 (Okl. 1967) the final judgment of a court of competent jurisdiction is conclusive between the parties or their privies in a subsequent action involving the same subject matter, not only as to all matters actually litigated and determined in prior action but also as to all matters germane to issues which could or might have been litigated therein. See also *Dierks v. Walsh,* 165 P.2d 354 (Okl. 1946).

For the same reasons stated above, the Petitioners are barred from relitigating the issue of the effect of Order No. 260474. The record and briefs filed in the appeal which resulted in *Inexco,* supra, clearly show such issue to have been argued, considered and decided by the Court. (R. at 870 — Exhibit No. 85.)

The Petitioners argue that the principles announced in *Hansberry v. Lee,* 311 U.S. 32 (1950) and *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591 (1948) prohibit the application of the doctrines of res judicata and collateral estoppel against them simply because there has been a constitutional violation asserted. That is a misstatement of the meaning of the opinions rendered in those cases.

In *Hansberry* the Court refused to allow the holding in prior litigation to be used as a bar to the Petitioners claim because that Petitioner was not a party to the prior proceeding. The Court, in fact, recognized that issue preclusion doctrines can be given effect in the face of constitutional violations. However, in such instances there should be precise

compliance with all elements of the doctrines. The Petitioners herein do not contend they, or their predecessors, were not parties to the prior litigation.

In *Sunnen*, the Court rejected the lower court's application of the doctrines because the second action was upon a different Cause than the first. As a result the Court concluded the parties had not been given the opportunity to litigate the issues argued in the second Cause. In this case, the precise points argued in support of the petition for a Writ of Certiorari were raised in the prior proceeding. The "intervening" circumstances alleged to bring this case under the rationale of *Sunnen* took place long before the litigation which resulted in the first ruling. Policy No. 45 was issued well before the date of the second pooling order which was litigated upon to this Court in *Inexco*, supra.

PROPOSITION IV

THE ISSUES RAISED IN THE PETITION FOR A WRIT OF CERTIORARI FOUNDED ON ALLEGED RELIANCE UPON BOTH STATEMENT OF POLICY NO. 45 AND PETITIONERS' INTERPRETATION OF THE ORIGINAL POOLING ORDER FORM NO BASIS FOR GRANTING THE REQUESTED RELIEF.

The Application in Cause CD No. 149617, and the evidence presented in support thereof, are replete with reference to acts of reliance by all Petitioners except Viersen. Some of the Petitioners claim to have believed that an election not to participate in the risk of drilling the initial unit well would not affect their working interest within subsequent wells. Allegedly, those Petitioners relied upon Policy No. 45, and upon use of the word "well" within the original pooling order, to come to such a conclusion. Even if taken as true, those assertions cannot result in the granting of this Petition.

SUBPROPOSITION A:

ANY RELIANCE OF PETITIONERS UPON POLICY NO. 45 WAS UNFOUNDED AND CANNOT FORM THE BASIS FOR A CHANGE IN ELECTIONS UNDER ORDER NO. 260474.

Arguably, an administrative agency may interpret a statute. However, the statute must be ambiguous to justify the agency's interpretation. *Cullinan v. McColgan,* 183 P.2d 115 (Cal. Ct. App. 1947). In Policy No. 45 the Commission claimed that there was a need for interpretation of 52 O.S. 1981, §87.1(e). That claim is clearly erroneous. The Oklahoma Supreme Court has held that the provisions of 52 O.S.A. 1981 §87.1(e) are clear and unambiguous. *Ranola Oil Company v. Corporation Commission of Oklahoma, et al.,* 752 P.2d 1116 (Okl. 1988); See also *Amoco Production Company v. The Corporation Commission of Oklahoma,* 751 P.2d 203 (Okl. Ct. App. 1986) and *Amoco Production Company v. Corporation Com'n,* 752 P.2d 835 (Okl. App. 1987).

Further, the Commission may not change the statute through its interpretation thereof. Any such interpretation which would give to the Commission authority in excess of that granted by the statute must be ignored. *Emery Mining Corporation v. Secretary of Labor,* 744 F.2d 1141 (10th Cir. 1984).

No party has the right to claim reliance upon a defective rule, regulation or policy of an administrative agency. In *Enfield v. Kleppe,* 566 F.2d 1139 (10th Cir. 1977) the Court was considering a party's claim of reliance upon an invalid regulation. The Court refused such defense and said:

> "Since the defective regulation was never valid, there was no right to rely on it. See *Dixon v. United States,* 381 U.S. 68, 73, 85 S. Ct. 1301, 14 L. Ed. 2d 223 (1965), *Atlantic Richfield Co. v. Hickel,* supra."

A similar pronouncement was made in *Saint Francis Memorial Hospital v. United States,* 648 F.2d 1305, 227 Ct.Cl. 307 (Ct.Cl. 1981) in which the Court stated that reliance on one's own interpretation of an imprecise regulation does not create an entitlement based on that interpretation, or a violation of due process, when the regulator or court adopts another ruling.

The Court of Appeals of the State of Oklahoma in *Amoco Production Company v. Corporation Com'n,* 752 P.2d 835 (Okl. App. 1987) found that Policy No. 45 represents "an arbitrary and erroneous interpretation of 52 O.S., Section 87.1." The Court found that only the legislature could change the statute and give the Commission authority to pool by the wellbore. Given such fact, no party can successfully assert a right to rely upon the policy.

In this Cause Respondent established that it had correctly interpreted the statute and had chosen to ignore the erroneous interpretation given by the Commission in Policy No. 45. (R. at 578-579; 598-600.) It would be patently unfair to punish Respondent for its correct interpretation of law by accepting the argument of the Petitioners.

The Petitioners argue that Policy No. 45 had the effect of a rule. They presented testimony to the Commission of Robert Goldfield, the original drafter of the policy, to support such claim. (R. at 333-304.) However, when the Policy Statement issued on May 4, 1984, both the controlling statute and Commission rule clearly prescribed a procedure to be followed for rulemaking. 52 O.S. 1980, Section 97 and Rule 12 of the OCCRP both dictated filing of an application, publication of a notice of hearing and a formal hearing prior to implementation of a rule. Mr. Goldfield acknowledged that those procedures were not followed prior to issuance of Policy No. 45. The Commission failed to abide by either the statute, or its own rules.

Whether characterized as an attempt at interpretation of the statute, or as a Commission rule, the Policy No. 45 is clearly erroneous and any party's reliance thereon was unjustified.

SUBPROPOSITION B

THERE WAS NO EVIDENCE OF RELIANCE BY VIERSEN OIL AND GAS COMPANY UPON EITHER POLICY NO. 45 OR THE ORIGINAL POOLING ORDER.

Viersen was a named respondent in Cause CD No. 108567. It was the owner of 159.5 net mineral acres in Section 23. Viersen appeared at the hearing in the Cause on April 20, 1984. The original pooling order was issued by the commission on June 6, 1984, providing Viersen 15 days from that date to elect among the fair market value alternatives. Viersen made the election for cash bonus and relinquished its working interest to Inexco. Not until much later, on January 28, 1985, did Viersen purport to lease its working interest in Section 23 to Nova Energy Corporation. (R. at 860 — Exhibit No. 75.)

At the hearing before the Commission in Cause CD No. 149617 there was never presented any evidence to establish that Viersen relied upon either Policy No. 45, or the use of the word "well" in connection with the original pooling order, in making an election under that Order.

Petitioners try to hide this evidentiary deficiency relating to Viersen by reference to the reliance of the Petitioners as a group. The record only reflects attempts by the successors to Viersen to assert reliance upon Policy No. 45 or the original pooling order. (R. at 400.) Any such reliance by those parties is not relevant to this Petition. Once Viersen elected not to participate in the initial well to be drilled under the order, its working interest vested in Inexco. See *Inexco,*

supra. The acts of Viersen's successors subsequent to the expiration of the 15-day election period cannot divest such rights.

Even if this Court were to conclude that the alleged acts of reliance form a basis for the requested relief, such conclusion would leave unaffected the rights relinquished by Viersen.

RELIEF REQUESTED AND CONCLUSION

In view of the foregoing, further review of this action is unwarranted. This Court should deny the Petition based upon the fact that the Petitioners fail to show any defect in the notice preceding entry of the original pooling order. Just as important, the Petitioners have argued the same claims in prior actions and are now precluded from relitigating those issues again. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1993

WARD PETROLEUM CORPORATION, et al.,

Petitioners,

vs.

THE OKLAHOMA CORPORATION COMMISSION, et al.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Oklahoma – Division III – MacFarlane Company And Trimble Properties

BRIEF IN OPPOSITION

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RULE 29.1 STATEMENT

Respondents MacFarlane Company and Trimble Properties have no parent companies and have no corporate subsidiaries which are not wholly owned.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA – DIVISION III

Respondents MacFarlane Company and Trimble Properties respectfully request that this Honorable Court deny the Petitioners' request for a Writ of Certiorari to the Oklahoma Court of Appeals. The Petitioners were not denied due process. Further, Petitioners' claims are barred by the doctrine of res judicata.

OPINIONS BELOW

See Petitioners' Appendix at APP 5 – APP 10 for the Oklahoma Court of Appeals Opinion and APP 11 – APP 61 for the Order of the Oklahoma Corporation Commission.

SUMMARY OF REASONS FOR DENYING PETITIONERS' REQUEST

As can be seen from Petitioners' Brief, the history of this dispute is long. The particular Petition for Writ of Certiorari presently before the Court emanates from an application filed by Petitioners at the Oklahoma Corporation Commission. Petitioners seek to vacate a 1984 pooling order or, in the alternative, to reopen the Oklahoma Corporation Cause resulting in the 1984 pooling order. The Order which Petitioners seek to vacate force pooled Section 23, Township 12 North, Range 14 West, Custer County, Oklahoma.

Below, Petitioners claimed entitlement to the requested relief based on a contention that the notice relating to the 1984 pooling order was inadequate. Petitioners then claimed that because of the alleged inadequate notice, they were denied an opportunity to make a properly informed election under the pooling order.

As will be discussed below, the Petition for Writ of Certiorari to the Oklahoma Court of Appeals should be denied because: (1) the notice of the 1984 pooling proceeding was adequate; and (2) the doctrine of res judicata applies and prevents relitigation of the same issues presented in *Inexco Oil Co. v. Corporation Commission*, 767 P.2d 404 (Okla. 1988), *cert. denied*, 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed.2d 414 (1989). The Oklahoma Court of Appeals did not decide a federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals. The Oklahoma Court of Appeals did not decide an important question of federal law which has not been, but should be, settled by this Court. The Oklahoma Court of Appeals did not decide a federal question in a way that conflicts with applicable decisions of this Court.

CORRECTION TO AND COMPLETION OF PETITIONERS' STATEMENT OF THE CASE

Petitioners contend that Oklahoma Corporation Commission Order No. 260474, the 1984 pooling order, should be vacated "on the basis of misleading and erroneous notice". Petitioners refer to Commission Policy Statement No. 45 as the Commission's "third notice in

Cause CD No. 108567." (See Petitioners' Brief at p. 10). This is incorrect. Policy Statement No. 45 was not notice in Cause No. CD No. 108567, the cause out of which the 1984 pooling order emanated. Policy Statement No. 45 was not even a part of the record in the pooling proceedings. Policy Statement No. 45 was issued without any formal procedure with respect to a hearing or a notice of hearing. Policy Statement No. 45 was issued May 3, 1984, thirteen days after the hearing on the merits of the 1984 pooling application.

At page 13 of their Brief, Petitioners state that Petitioner, Ward Petroleum Corporation, obtained orders from the Commission allowing the drilling of an increased density well at an off-pattern location. The Orders Petitioners refer to at page 13 of their Brief, however, granted separate applications of both Respondent Inexco and Petitioner Ward. The applications had been consolidated for hearing. Both parties were named operator, with the ultimate operator to be determined by a second pooling proceeding.

As Petitioners state, Ward "sought another pooling order of the Commission, allowing it an election to participate in the increased density well". Ward's application was an attempt to repool Section 23, *i.e.* modify the Order from the 1984 pooling proceeding. The hearing of the second pooling proceeding, which authorized the drilling of the increased density well, was not conducted before the Corporation Commission Hearing Officer until March 1, 1985. Order No. 277146 was entered in the combined causes, allowing Petitioner Ward to not only participate in the increased density well, but to also operate it.

Inexco, however, appealed Order 277146. The Oklahoma Supreme Court, on appeal, reversed the Corporation Commission's order allowing Ward to participate in the increased density well. *Inexco v. Corporation Commission*, 767 P.2d 404 (Okla. 1988), *cert. denied*, 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed.2d 414 (1989).

Specifically, the Oklahoma Supreme Court held:

> By accepting the bonus, Ward assigned its exploratory rights to Inexco, the operator and can assert no right to participate in the subsequent increased density wells. *Inexco*, 767 P.2d at 405.

Petitioners in this matter then petitioned this Court for a Writ of Certiorari to the Oklahoma Supreme Court. In that Petition, the Petitioners argued:

> "The First Order – together with Policy Statement No. 45 – gave clear notice to Petitioners that the First Order had only a well-bore scope, so that an election not to participate would *not* prejudice Petitioners' ability to exploit their leasehold through participation in later wells to be drilled in the unit. Acting on this notice, Petitioners made an opt-out election under the First Order. (R. at 70 – Exhibit No. 85).

The Petition for Writ of Certiorari was denied in the cause styled in this Court as *Ward Petroleum Corporation v. Louisianna Land and Exploration Company*, 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed.2d 414 (1989)

Notwithstanding this Court's denial of the Petition for Writ of Certiorari, Petitioners filed the application which is the subject of this appeal, raising the same arguments raised in the second pooling proceeding, *i.e.*

the proceeding from which *Inexco* emanated. After five days of hearings, the Administrative Law Judge, in a 34 page, very detailed report, rejected each of Appellants' arguments. She reported in her Conclusions:

> "2. The application is subject to res judicata and collateral estoppel and therefore should be denied. A complete reading of the documents presented within Exhibit 85 reveals that they are not merely a blueprint for the application presented in this cause but are identical in their presentation of issues, and almost in the words used. The parties thus had a full and fair opportunity to present these arguments and issues before the Oklahoma Corporation Commission, the Oklahoma Supreme Court, and the U.S. Supreme Court. These arguments and issues were considered and were denied by the Oklahoma Supreme Court and the U.S. Supreme Court. While the denial of these arguments and issues may appear to be harsh and unfair to the applicant and supporting parties, the Oklahoma Supreme Court (and U.S. Supreme Court), apparently, disagreed. The Oklahoma Supreme Court reviewed the entire situation, including the extreme results which could occur if the first order was termed to be a unit order with no amendments permitted, and determined that the proper decision was the one it made. To grant the present application in any manner or form would be a direct repudiation and disregard of the Oklahoma Supreme Court's decision in *Inexco Oil Co. v. Oklahoma Corp. Com'n*, 767 P.2d 404 (Okla. 1988).

* * *

> "A reading of each of the pleadings in Exhibit 85 shows a zealous representation was made to the Oklahoma Supreme Court of the very same issues which were presented to the Commission in the present application. It most definitely cannot be said that the parties were not given a full and fair opportunity to argue and did not accept and use the opportunity to argue all sides of the pooling question. Thus, each of the issues raised in the present application was raised and fairly and fully litigated before the Court, which made a decision, apparently, based upon the arguments presented in the initial appeal and in the subsequent pleadings, therefore res judicata and collateral estoppel apply."

On appeal from the Initial Report of the Administrative Law Judge, Petitioners renewed their same arguments. The Appellate Administrative Law Judge affirmed the recommendations contained in the Initial Report of the Administrative Law Judge with the exception that the Appellate Administrative Law Judge found Appellants' new application to be a direct attack on the original pooling order, rather than a collateral attack, as had been found by the Initial Administrative Law Judge. The Appellate Administrative Law Judge also determined that Appellants were barred by the doctrines of res judicata and estoppel by judgment. The Appellate Administrative Law Judge held:

> "Res judicata bars a second suit between the same parties on the same subject matter resolving the same issues between the parties or any issues that might have been raised by the parties. *Brown v. Briggs*, 292 P.2d 385 (Okla. 1956); *Federated Department Stores, Inc. v. Moitie*, 452

U.S. 394 (1981); *Lewis v. Aubrey*, 404 P.2d 1005 (Okla. 1965)."

The same arguments were made by Appellants on appeal before the Commission en banc. The Commission, after considering argument of counsel, issued Order No. 358995. The Commission, in its final order, adopted, by reference, the Initial Report of the Administrative Law Judge, as well as the recommendation of the Appellate Administrative Law Judge. (APP 52). The Commission, in concluding that Appellants' application should be denied, stated:

> "It is the opinion of the Commission that the Applicants have failed to establish any basis for vacating or modifying Order No. 260474. To do so would violate the vested rights of the Protestants." APP 52 – APP 53.

The Oklahoma Court of Appeals affirmed the Commission (APP 4) and the Oklahoma Supreme Court denied Petitioners' request for discretionary review. (APP 1).

ARGUMENTS AND AUTHORITIES

PROPOSITION I: NOTICE OF THE HEARING OUT OF WHICH ORDER NO. 260474 WAS ISSUED WAS NOT MISLEADING AND DID NOT DENY PETITIONERS DUE PROCESS.

These Respondents note at the outset of this proposition that Petitioners do not, and more importantly cannot, argue that they did not receive notice of the 1984 pooling

proceeding. Nothing more than this fact confirms that the notice standards set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) have been satisfied. That is, in *Mullane*, this Court said:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane*, 339 U.S. at 314, 94 L.Ed. at 873.

Here, Petitioners were apprised of the pendency of the action. Petitioners were afforded an opportunity to present their objections. Indeed, Petitioners were present at the hearing. Clearly, the notice relating to the 1984 pooling proceedings satisfied the requirements of *Mullane*.

Petitioners refer the Court to eight United States District Court cases for the proposition that " . . . notice issued by an administrative agency satisfies due process, unless the recipient can demonstrate that he or she was misled". These eight cases are cited by Appellants at Pages 24 and 25 of Petitioners' Brief. Review of those cases show that they are either not on point, or upon analysis, support the proposition that the notice received by the Petitioners was sufficient. *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044, 110 S.Ct. 839, 107 L.Ed.2d 835 (1990) related to notice of a hearing in connection with certain violations of cable television franchises. The notice was found to be sufficient. *Cosby v.*

Ward, 843 F.2d 967 (7th Cir. 1988), was a case where unemployment compensation claimants challenged Illinois' active work search requirements. The notice of the hearing was found to contain inadequate notice of the issues to be determined. Conversely, here, the parties, including Petitioners, were notified that the Applicant was requesting that "all of Section 23" be pooled. (See Petitioners' Brief at p. 8).

In *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358 (10th Cir. 1979), the Tenth Circuit held that a complaint containing an incorrect docket number and which failed to provide respondents with copies of the standards violated was valid. Specifically, the Tenth Circuit said:

> "As long as a party to an administrative proceeding is reasonably apprised of the issues in controversy, and is not misled, the notice is sufficient." *Savina*, 594 F.2d at 1365 (10th Cir. 1979)

Intercontinental Industries, Inc. v. American Stock Exchange, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied*, 409 U.S. 842, 93 S.Ct. 41, 34 L.Ed.2d 81 (1972), involved a notice of hearing of a violation of stock exchange rules and a possible de-listing from the exchange. The notice of hearing was found to be adequate. *L.G. Balfour Co. v. Federal Trade Commission*, 442 F.2d 1 (7th Cir. 1971), related to a notice of hearing by the Federal Trade Commission on a complaint that respondents violated prohibitions against unfair methods of competition. The Seventh Circuit held:

> "There is no requirement that a complaint in an administrative proceedings enumerate precisely every event to which a hearing examiner may finally attach significance. The purpose of the

> administrative complaint is to give the responding party notice of the charges against him." *L.G. Balfour Co.*, 442 F.2d at 19 (7th Cir. 1971)

Cella v. United States, 208 F.2d 783 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016, 74 S.Ct. 864, 98 L.Ed. 1138 (1954), involved a notice to a livestock dealer of a hearing before a judicial officer of the United States Department of Agriculture to suspend the dealer's registration under the Packers and Stockyards Act. The dealer argued that the notice was defective in that it failed to state the dates when the acts took place. The Court, in holding that the notice was valid, said:

> "In an administrative proceeding it is only necessary that the one proceeded against be reasonably apprised of the issues and controversy, and any such notice is adequate in the absence of a showing that a party was misled." *Cella*, 208 F.2d at 789 (7th Cir. 1953).

In *Mayhew v. Cohen*, 604 F. Supp. 850 (E.D. Pa. 1984), recipients of federal or state welfare assistance challenged the process by which the state Department of Public Welfare recouped alleged benefit overpayments. *Id.* at 857. The series of letters which the state used to advise of the recoupment process failed to give adequate notice. Here, notice was undeniably given and Petitioners were present at the hearing.

Finally, *Doston v. Duffy*, 732 F. Supp. 857 (N.D. Ill. 1988), involved notices relating to procedures of the Department of Public Aid terminating or reducing benefits to dependent children when clients failed to cooperate with the agency in locating an absent parent. *Dotson* involved: (1) hearings without notice; or (2) hearings with

untimely notice. *Doston* also addressed specific federal rules or regulations relating to notice. Again, in this case, notice was undeniably given and Petitioners were present at the hearing. (See Petitioners' Brief at pages 7-8).

The United States Supreme Court case cited by Petitioners, *Peralta v. Heights Medical Center*, 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988) is clearly distinguishable. The issue in *Peralta* was whether a party was required to show that it had a meritorious defense in order to have a default judgment vacated. The Petitioner had never been given an opportunity to raise a defense, meritorious or otherwise. This Court determined that because Petitioner had never been afforded an opportunity to be heard, the notice requirements of *Mullane* had not been satisfied. *Peralta*, 485 U.S. at 84, 99 L.Ed.2d at 81.

Here, Petitioners not only received notice but were present at the hearing. Petitioners' argument that notice was inadequate, therefore, unavailing.

Petitioners' efforts to transform Policy Statement No. 45 into something that it is not should also be rejected. The notice in the 1984 pooling proceeding is quoted at pages 7-8 of Petitioners' Brief. It clearly stated that the Applicants sought to pool all of Section 23. It clearly apprised Petitioners of the pendency of the action and afforded them with an opportunity to present their objections. Policy Statement No. 45 was issued thirteen days after the hearing. It had nothing to do with notice. It was unrelated to the cause out to which the pooling order was issued. Petitioners simply made an election, which, with the benefits of hindsight, they wish they had not made. Petitioners were not denied due process.

PROPOSITION II: THE DOCTRINE OF RES JUDICATA BARS PETITIONERS' CLAIMS.

The same parties in the instant proceeding participated in *Inexco v. Corporation Commission*, 767 P.2d 404 (Okla. 1988), *cert. denied*, 490 U.S. 1040, 109 S.Ct. 1943, 104 L.Ed.2d 414 (1989). Petitioners are at most raising new arguments involving the same set of facts. Res judicata, therefore, bars Petitioners' claims. In *Inexco*, Petitioners argued that they should be allowed to participate in the increased density well which was subsequently drilled.

In this case, they make the same argument. It is settled that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. To this effect, in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), this Court said:

> "There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Federated Department Stores*, 452 U.S. at 398, 69 L.Ed.2d at 108-109.

See also, Braine v. Stroud, 385 P.2d 428, 431 (Okla. 1963) (A final judgment is conclusive between the parties as to all matters and issues which could have been litigated.) Again, Petitioners raised Policy Statement No. 45 in *Inexco*. However, assuming for purposes of argument only that they did not, it certainly cannot be said that Petitioners could not have argued their theory based on

Policy Statement No. 45. Clearly, Petitioners are barred from raising that theory by the doctrine of res judicata.

CONCLUSION

Petitioners have not been denied due process. Petitioners' claims are barred by the doctrine of res judicata. The Petition for Writ of Certiorari to the Oklahoma Court of Appeals should be denied.

Respectfully submitted,

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